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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 628

EDWARD J. KAZUBOWSKI,

Petitioner,

vs.

BETTY DOLAR KAZUBOWSKI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

EDWARD J. KAZUBOWSKI, *Pro Se*
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No.

EDWARD J. KAZUBOWSKI,

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BETTY DOLAR KAZUBOWSKI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Edward J. Kazubowski, prays that a writ of certiorari issue to review a judgment of the Supreme Court of Illinois entered on March 24, 1970, dismissing the appeals from the order to show cause and the order regulating the pleadings, entered on April 28, 1969, and affirming all other orders entered in the Circuit Court of Henry County, 14th Judicial Circuit of Illinois, from which appeals have been taken in these consolidated cases.

OPINIONS BELOW.

The opinion of the Appellate Court of Illinois, Third Judicial District, rendered March 14, 1968, is reported in 93 Ill. App. 2d 126, 235 N.E. 2d 664, and is printed in Appendix D herein at page 17a, *et seq.* The opinion of the Supreme Court of Illinois, rendered March 24, 1970, is not as yet reported in the State Reporter but is reported in 259 N.E. 2d 282, and is printed in Appendix E herein at page 27a, *et seq.*(1)

(1) The record before this Court includes the portion of the trial court records before the Supreme Court of Illinois, designated by "R"; the Briefs of the parties in the Appellate Court, Third Judicial District of Illinois, certified by the Clerk of the Appellate Court, being petitioner's principal and reply brief as Appellant, and respondent's Brief as Appellee, and the opinion of the Appellate Court of Illinois, designated as "AR". Briefs of the parties in the Supreme Court of Illinois, certified by the Clerk of the Supreme Court, being petitioner's principal and reply brief as Appellant, and respondent's Brief as Appellee, and the opinion of the Supreme Court of Illinois, and petitioner's petition for rehearing, designated as "SR".

JURISDICTION.

The judgment of the Supreme Court of Illinois was entered on March 24, 1970. A timely petition for rehearing filed on April 2, 1970, was denied, without opinion, on June 25, 1970. A motion to stay the mandate pending the timely filing of a petition for certiorari in the Supreme Court of the United States and a final disposition of this cause, was not filed in the Supreme Court of Illinois for the following reasons. On June 26, 1970, petitioner was notified by letter from the Clerk of the Supreme Court of Illinois that the petition for rehearing had been denied. On the afternoon of June 26, 1970, the Sheriff of Henry County, Illinois, two deputy sheriffs of Henry County, the Chief of Police of the City of Kewanee, Illinois, and two other police officers, surrounded the residence and dental office of petitioner, which are under the same roof, while the Sheriff and a deputy sheriff used a crow bar to break the lock on the rear screen door of the residence, removed a lock from the inner door of the residence, searched the premises, handcuffed petitioner, searched petitioner, took petitioner into custody upon serving petitioner with a search warrant for the person of petitioner, at his residence and dental office, issued by Judge Dan H. McNeal. The search warrant was issued under the number of the original divorce action commenced by the respondent on November 23, 1965. Petitioner was also served with a mittimus reciting that a *direct* contempt against petitioner was entered May 7, 1969, by Judge Paul E. Rink, and that a warrant for that purpose issue.

A copy of the search warrant issued June 26, 1970, is Appendix F herein at page 41a. A copy of the mittimus is Appendix G herein, at page 42a. Petitioner also includes a copy of the order entered May 7, 1969, by Judge Paul E. Rink and is Appendix H at pages 43a-44a. The complaint, signed by the Sheriff of Henry County, Illinois, is Appendix I at page 45a.

Your petitioner was imprisoned and not afforded any hearing and was not then, and is not now, informed of the charge, or charges, of an offense committed, or about to be committed.

The motion to stay the mandate would have been presented primarily for preventing enforcement of the contempt order of May 7, 1969. The taking of petitioner into custody and the manner in which he was taken into custody is indicative of the highly irregular proceedings, which have so far departed from the accepted and usual course of judicial proceedings to confiscate petitioner's liberty and property without due process and equal protection of the laws, and has been sanctioned by the Supreme Court of Illinois.

A total of $50,000 in appeal bonds, ordered to be given by this petitioner at various stages of these proceedings, have been totally suppressed and omitted from the opinion rendered by the Supreme Court of Illinois. None of the supersedeas approved in the trial court and Appellate Court stayed or suspended the proceedings. All orders entered in defiance of the supersedeas have been affirmed by the Supreme Court of Illinois and enforced against petitioner without any opportunity to be heard. For these reasons, no motion was filed for staying the mandate of the Supreme Court of Illinois.

The mandate of the Supreme Court of Illinois was filed in the trial court on July 7, 1970.

The jurisdiction of this Court is invoked under U.S.C. 1257(3). The federal questions sought to be reviewed were first raised in the trial court by way of pleadings in the amended objections and motion to vacate a separate and independent property decree, entered without notice to petitioner and without an opportunity to be heard (R. C161, C188).[2]

After the adoption of the new Judicial Article in 1964, the Appellate Courts of Illinois had jurisdiction of issues involving a freehold. The appeal from the property decree was thus taken to the Appellate Court, Third District. The freehold issue and other issues pertaining to due process of law, were not determined by the Appellate Court. The Appellate Court, while recognizing the final decree of divorce, nevertheless, affirmed an order awarding a former wife alimony, attorney fees and expenses on appeal from the separate and independent property decree, as though the divorce decree were on appeal and as though no supersedeas had been approved prior to the entry of the order for alimony, attorney fees and expenses pending the appeal from the property decree. The Appellate Court affirmed a summary contempt of court order against petitioner, in absentia, entered September 15, 1966, which was not on appeal by the maneuver of the respondent and her attorney. Appellee's brief filed

[2] Record references are taken from Case No. 42415, consisting of 784 pages, which include those portions of the other two records filed in the Supreme Court of Illinois. Record references of Case No. 42415 are cross-indexed to cases No. 42321 and 42416 in the designation of excerpts from the record and Excerpts from Record, all a part of the record filed in this Court.

in the Appellate Court, at pages 19 and 20, admits the contempt order of September 15, 1966 was not on appeal and not before the court for review. The Appellate Court opinion disregarded the issues of the freehold involved and ruled the property decree to be a "consent decree". Other issues were not determined by the Appellate Court, nor were the supersedeas approved in the trial court, mentioned in the opinion. The opinion of the Appellate Court was rendered March 14, 1968 and ruled as follows: (Appendix D, p. 26a):

> "The appeal of appellant, Edward J. Kazubowski, with respect to the decree for divorce is accordingly dismissed and the decree of August 31, 1966, as well as the orders of September 15, 1966, and September 23, 1966, are affirmed."

No rehearing was requested. A petition for leave to appeal as a matter of right to the Supreme Court of Illinois was filed May 10, 1968, denied without opinion, on September 23, 1968. On October 16, 1968, the Appellate Court, Third District, entered its order staying the mandate for a period of 90 days from and after September 23, 1968, upon the condition that petitioner file an additional bond in the Appellate Court in the amount of $20,000, and upon the further condition that the $30,000 in appeal bonds, approved as supersedeas in the trial court, remain in full force and effect.

Petitioner filed the additional bond in the Appellate Court as ordered on October 24, 1968. The bond was approved by the Clerk of the Appellate Court as ordered, on October 24, 1968. On December 13, 1968, an order was entered by the Honorable Thurgood Marshall, Associate Justice of the Supreme Court of the United States, extending the time to file the petition for writ of certio-

rari to the Appellate Court of Illinois, Third District, to and including January 20, 1969. The petition for writ of certiorari to the Appellate Court of Illinois, Third District, was filed January 20, 1969 in the Supreme Court of the United States, and denied, without opinion, March 3, 1969, 393 U.S. 1117, 22 L. Ed. 2d 122, 89 S. Ct. 993. The mandate of the Appellate Court was filed in the Circuit Court of Henry County, 14th Judicial Circuit of Illinois, on March 12, 1969.

The federal questions sought to be reviewed and the questions relating to the lack of power or jurisdiction of the trial court to enter certain orders after a final divorce decree had been entered by the trial court, and after the appeal bonds were given as ordered and approved as supersedeas, and entered during the pendency of the appeal, were again raised by pleadings in the trial court (R. C586-593, C603-606, C608-614). These issues were not determined by the trial court, as no hearings have been permitted to this petitioner since June 2, 1966.

Violations of the laws and Constitution of Illinois and denials of due process and equal protection of the laws under the Constitution of the United States are again alleged by pleadings (e.g. motion for refund and restitution of $14,000 demanded for the liberty and release of petitioner and paid under duress to obtain the liberty and freedom of petitioner under the illegal contempt mittimus issued March 24, 1969 for $4,900 alimony and $500 attorney fees upon the affirmance of the summary contempt order against petitioner, in absentia, on September 15, 1966 (R. C630-648; also briefs in Reviewing court and petition for rehearing).

The federal questions sought to be reviewed in the Supreme Court of Illinois and the constitutional questions raised relating to the power or jurisdiction of the trial court to enter certain orders, and the constitutional questions raised relating to the power or jurisdiction of the Appellate Court to render the judgment, were not reviewed by the Supreme Court of Illinois. The opinion rendered on March 24, 1970 states (Appendix E, p. 35a):

> "The appellate court in this case has decided that all orders and decrees of the circuit court entered prior to the appeal are valid and enforceable. This court denied leave to appeal and the U. S. Supreme Court denied *certiorari*. Any possible questions of validity as well as those of jurisdiction of the subject matter or person are thus settled and the result is binding upon the parties."

The Supreme Court of Illinois suppressed and omitted mention of $50,000 in appeal bonds, approved as supersedeas, and affirmed all adverse orders against petitioner, entered in repeated defiance of those supersedeas.

This petition raises constitutional questions relating to the power or jurisdiction of the Illinois Supreme Court in rendering the opinion, and further questions the suppression of $50,000 in appeal bonds, approved as supersedeas, which the Supreme Court of Illinois refused and declined to mention in the opinion, while permitting the respondent to seek recovery of money on the appeal bonds, without any opportunity to this petitioner, or to the sureties on the bonds, to be heard and to defend. A question of public policy is involved in that a final divorce decree had been awarded respondent on June 13, 1966.

Consideration by this Court is necessary on the ground that the opinions below lack power and jurisdiction to render the judgments, and the opinions conflict squarely with the essential requirements of due process and equal protection of the laws as ruled by this Court.

This petition for writ of certiorari is filed less than 90 days from the denial of the petition for rehearing.

QUESTIONS PRESENTED.

1. Whether petitioner was deprived of due process of law by the minute order docket entry of approval by the trial judge of a document entitled "Stipulation" executed and signed by a person as "Perona and Perona" as attorneys for petitioner, which was not authorized and not known to petitioner until one week later and made known to the trial judge that the "Stipulation" was not authorized by petitioner.

2. Whether the trial judge deprived petitioner of due process of law by the entry of the separate and supplemental property decree without notice to petitioner and without an opportunity to be heard and to defend, during a hearing set by the respondent on a matter separate and distinct from the entry of a decree.

3. Whether the trial judge deprived petitioner of due process and equal protection of the laws by summarily finding petitioner in contempt of court, in absentia, for failure to comply on September 1, 1966, with the terms of a property decree during a hearing on amended objections and motion to vacate the property decree.

4. Whether the trial judge denied petitioner due process and equal protection of the laws by the order allowing petitioner 5 days in which to present an appeal bond

in the amount of $25,000 for approval of the court to act as a supersedeas.

5. Whether the trial court lacked power and jurisdiction to award the respondent alimony when the respondent had been awarded a final decree of divorce by the trial court on June 13, 1966.

6. Whether the trial court lacked power and jurisdiction to award the respondent attorney fees and expenses pending an appeal from the property decree.

7. Whether the Appellate Court lacked jurisdiction to rule that the property decree of August 31, 1966, was a consent decree.

8. Whether the affirmance of the order awarding respondent alimony, attorney fees and expenses pending the appeal was in excess of the power and jurisdiction conferred upon the Appellate Courts of Illinois.

9. Whether petitioner was denied due process and equal protection of the laws by the Appellate Court in affirming the summary contempt order of September 15, 1966.

10. Whether petitioner was denied due process and equal protection of the laws by the refusal of the Appellate Court to review the proceedings in the trial court.

11. Whether the suppression and omission of the supersedeas in the opinion of the Appellate Court was for improper and corrupt means and deprived petitioner of liberty and property without due process and equal protection of the laws.

12. Whether the Supreme Court of Illinois lacked power and jurisdiction or exceeded the powers conferred upon it by the Constitution, to affirm the judgment of the Appellate Court and the orders entered pursuant to that judgment and denied petitioner due process and equal protection of the laws.

(A) Whether the imprisonment of petitioner on March 24 and March 25, 1969, was based upon an im-

proper and illegal contempt mittimus and void orders, as was the order of payment on March 25, 1969, and deprived petitioner of liberty and property without due process and equal protection of the laws.

(B) Whether the order for supplemental attorneys fees was entered in excess of the powers and jurisdiction conferred upon the trial court and was a violation of due process and equal protection of the laws.

(C) Whether the order to show cause for failure to pay alimony was a subterfuge for the entry of the order entered May 7, 1969, and was entered for improper motives to deprive petitioner of liberty and property without due process and equal protection of the laws.

(D) Whether the order regulating pleadings of petitioner was a violation of due process of law and entered for improper motives.

(E) Whether the order of May 7, 1969, for six months commitment of petitioner for failure to pay $8,820 alimony to respondent as required of petitioner under the order of September 23, 1966, was entered in excess of the power and jurisdiction conferred upon the court and was a violation of due process and equal protection of the laws.

13. Whether the suppression of $50,000 in appeal bonds, approved as supersedeas and omitted in the opinion rendered by the Supreme Court of Illinois was for corrupt and improper means.

14. Whether the opinions rendered by the Appellate Court and Supreme Court of Illinois violate the "Supremacy Clause" of the United States Constitution.

15. Whether a due process violation has been accomplished by the Illinois State Judiciary.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,

The "Supremacy Clause", Article VI, Clause 2 is printed in Appendix A hereto, infra, page 1a.

The Fourth Amendment is printed in Appendix A, hereto, infra, page 1a.

The Fourteenth Amendment is printed in Appendix A hereto, infra, page 1a.

Illinois Constitution,

Article II,

Section 2 is printed in Appendix A hereto, infra, page 2a.

Section 6 is printed in Appendix A hereto, infra, page 2a.

Section 12 is printed in Appendix A hereto, infra, page 2a.

Section 19 is printed in Appendix A hereto, infra, page 2a.

Article III is printed in Appendix A hereto, infra, page 2a.

STATUTES INVOLVED

Civil Rights Acts

42 U.S.C.A., Section 1983 is printed in Appendix B herein, infra, page 3a.

Illinois Divorce Act

(Ill. Rev. Stat. 1965, Chapter 40):

Section 5 is printed in Appendix B hereto, infra, page 4a.

Section 7 is printed in Appendix B hereto, infra, pages 4a-5a.

Section 16 is printed in Appendix B hereto, infra, pages 5a-6a.

Section 19 is printed in Appendix B hereto, infra, pages 7a-8a.

Illinois Criminal Procedure of 1963

(Ill. Rev. Stat. 1969, Chapter 38):

Section 109-1 is printed in Appendix B hereto, infra, pages 3a-4a.

Section 109-3(a) is printed in Appendix B hereto, infra, page 4a.

Illinois Civil Practice Act

(Ill. Rev. Stat. 1965, Chapter 110):

Section 1 is printed in Appendix B hereto, infra, page 3a.

Section 50(2) is printed in Appendix B hereto, infra, pages 8a-9a.

Section 50(6) is printed in Appendix B hereto, infra, page 9a.

Section 68.3(2) is printed in Appendix B hereto, infra, page 9a.

Section 74(1) is printed in Appendix B hereto, infra, page 9a.

Section 82(1) is printed in Appendix B hereto, infra, pages 10a-11a.

Section 101.33(5) is printed in Appendix B hereto, infra, page 11a.

Section 101.36(1)(a) is printed in Appendix B hereto, infra, page 12a.

Section 101.36(2)(a) is printed in Appendix B hereto, infra, pages 12a-13a.

Section 101.37(6) is printed in Appendix B hereto, infra, page 13a.

RULES OF COURT INVOLVED

Illinois Civil Practice Act

(Ill. Rev. Stat. 1969, Chapter 110A):

Section 304 (Supreme Court Rule 304) is printed in Appendix C hereto, infra, page 14a.

(Ill. Rev. Stat. 1965, Chapter 110):

Section 302.1 (Circuit Court Rule 2.1) is printed in Appendix C hereto, infra, pages 14a-16a.

Section 307.1 (Circuit Court Rule 7.1) is printed in Appendix C hereto, infra, page 16a.

STATEMENT OF THE CASE.

The peculiar and complicated factual background of this case necessarily involves a more detailed statement of the case for an understanding. On November 23, 1965, the respondent commenced divorce proceedings against petitioner in the Circuit Court of Henry County, 14th Judicial Circuit of Illinois. No children were born or adopted by the parties. The complaint filed was the usual type of complaint for divorce (R. C3-16). On December 13, 1965, prior to any pleadings filed by petitioner, the respondent was awarded $50.00 per week temporary alimony and petitioner was ordered to pay $100.00 attorney fees (R. C19). Petitioner made the payments at all times as ordered. On February 10, 1966, the respondent filed an amended complaint for divorce and prayed for relief in nine paragraphs (R. C32).

On June 2, 1966 a jury trial on the issues of divorce was had before Judge Dart H. McNeal. A verdict was awarded respondent on June 2, 1966. On June 13, 1966, respondent revised the divorce decree to include the provisions of section 50(2) of the Illinois Civil Practice Act (Ill. Rev. Stat. 1965, Ch. 110, sec. 50(2), now in part Supreme Court Rule 304), to provide for multiple claims: (1) termination of the marriage and (2) property rights and other claims (R. C92; Appendix F, p. 5a of Appellant's brief filed in the Illinois Supreme Court).

The respondent's amended complaint was patterned on the case of *McGee* v. *McGee*, 36 Ill. App. 2d 105, 183 N.E. 2d 545 (1962). The opinion was written by the trial judge,

Dan H. McNeal, while a former Appellate Court Justice in the Second District, First Division, which has since become the Third Judicial District of Illinois. In *McGee v. McGee, supra*, the plaintiff there prayed for dissolution of the marriage and various relief as to an award of her separate property, attorney fees, restoration of her maiden name, a suitable property settlement and other relief. In 36 Ill. App. 2d 105 at page 108 of *McGee v. McGee*, multiple claims were expressly or impliedly found, and it was determined there that the divorce decree entered by the trial court made no express finding that there was no just reason for delaying appeal, and in the absence of the express finding required by section 50(2) the decree adjudicated fewer than all the matters in controversy between the parties and was not appealable.

Paragraph 6 of the revised divorce decree entered by Judge McNeal on June 13, 1966 provides (R. C92):

> "The Court further finds that in the matter touching upon the divorce of the parties, heretofore determined by a jury trial, that there is no reason for delaying enforcement or appeal of this portion of said order."

In its decree the court restored respondent's maiden name, and ordered that the petitioner continue the payment of $50.00 each week as temporary alimony under the order of December 15, 1965, and further ordered that "this cause is hereby continued for further determination of the matter of partition, permanent alimony, allowance of attorney's fees and for such further matters as may be properly and lawfully considered to terminate this cause" (R. C92-93).

On July 8, 1966, a post-trial motion was filed, heard and denied by Judge McNeal on July 12, 1966 (R. C96).

On July 25, 1966, the petitioner and respondent reached an oral agreement regarding a property settlement, which was to be reduced to writing and signed by the parties (R. C116-126). Petitioner, in reliance upon the oral agreement did not appeal from the final divorce decree.

On August 22, 1966, petitioner first had notice of a document entitled "stipulation", executed and signed by "Perona and Perona" as attorneys for petitioner (R. C109-112, 116-133). The "stipulation" was not authorized by petitioner and provided for terms beyond petitioner's powers to perform (R. C116-153). The record establishes correspondence and negotiations were being carried on between Attorney Louis J. Perona and petitioner, and correspondence was being carried on between Louis J. Perona and Gregg A. Young, attorney for respondent (R. C116-121, C148-152, C630-640). During the correspondence, and on August 30, 1966, Louis J. Perona and Anna A. Phelps, as attorneys for petitioner, received notice of a hearing set by the respondent for August 31, 1966, before the Honorable Judge Dan H. McNeal, at the Rock Island County Court House, Rock Island, Illinois, on a "motion to amend the stipulation" (R. C114). There was no such motion on file. Petition telephoned the Honorable Judge Dan H. McNeal, at the Rock Island County Court House to say that the document entitled "stipulation" was not authorized by petitioner. Judge McNeal replied that "Louis J. Perona had all kinds of authority to bind a client" and that there would be a hearing the following morning (R. C630-648 at 634; Appellant's principal brief filed in the Illinois Supreme Court, Appendix G, pages 6a-7a).

A motion to amend the stipulation to petitioner's agreement of July 25, 1966, or in the alternative to void the stipulation as it was not petitioner's agreement, was thereafter prepared on August 30, 1966. The motion, with 16 exhibits attached thereto, including petitioner's affidavit, was filed at the Henry County Court House at Cambridge, Illinois, on the morning of August 31, 1966, and immediately taken to the Rock Island County Court House (R. C116-153). Upon presentation of the motion, the Honorable Judge McNeal immediately denied the motion and signed a decree, prepared by respondent and her attorney, which had been concealed and withheld by the attorney for respondent until minutes only before the judge signed the decree (R. C155-159; Also see para. 2 of petition, R. C165). Oral objections were disregarded (R. C461-463, C488-489, C634). A copy of the decree had just prior thereto been handed to the attorneys for petitioner. No time was permitted the attorneys for petitioner to read the 5-page decree. There was no evidence. There was no testimony. There was no hearing. Respondent filed nothing relative to the motion filed by petitioner.

The property decree departed from the unauthorized stipulation and provided that the respondent retain her name on the real estate as a joint tenant as security for the payments of the obligations to be paid under the stipulation (R. C155).

The unauthorized stipulation, incorporated in the property decree, provided for the immedate conveyance of that joint tenancy interest (R. C116-126, C155).

Paragraph 1 of the unauthorized stipulation provides that the sum of $5,000 cash to be paid September 1, 1966

"shall be reduced by the amount of $100.00 paid as temporary alimony since July 25, 1966" (R. C109, C155).

On September 6, 1966, petitioner filed objections to the property decree, (R. C161), later obtaining leave to file amended objections and motion to vacate the property decree. The question of a denial of due process of law was raised (R. C188). On September 8, 1966, respondent filed a petition for citation to find petitioner in contempt for wilful failure to pay $4,900 September 1, 1966 with the terms of the property decree (R. C165).

Respondent set for hearing her petition for citation on the same date and time as petitioner's hearing to vacate the decree. Petitioner filed an answer to the petition for citation, alleging fraud and misrepresentation on the part of respondent and stated therein section 68.3 of Chapter 110 of the Civil Practice Act, (Ill. Rev. Stat. 1965, Ch. 110, sec. 68.3) (R. C179).

On September 15, 1966, the following order was entered (R. C191; also see R. C230):

1. Amended objections to the decree and motion to vacate decree overruled;
2. Petition of plaintiff for citation allowed;
3. Defendant found in contempt for wilful failure to pay $4,900 on September 1, 1966;
4. The Court allows $500 for plaintiff's attorney's fees to be paid instanter;
5. Defendant stands committed to the County jail of Henry County for a period of six months unless or until $5,400 paid to plaintiff;
6. Clerk of the Circuit Court of Henry County to issue a mittimus and defendant to be taken into custody.

There was no rule or order to show cause. No testimony was permitted except the testimony of the attorney for respondent as to his fees for services rendered after August 31, 1966, substantiated by his cousin (R. C196-231). Petitioner was summarily found in contempt of court; in absentia, and denied all rights to defend the action (R. C229-230). Immediately after the entry of the hand-written order of September 15, 1966, petitioner filed a notice of appeal from the property decree (R. C194, C234-236).

On September 16, 1966, Judge Conway L. Spanton entered an order for petitioner to present a bond in the amount of $25,000 within 5 days for approval of the court to act as a supersedeas (R. C241). On September 16, 1966, petitioner presented the bond with personal sureties thereon. The bond was approved by Judge Spanton and filed September 16, 1966, in the trial court (R. C243-247).

On September 23, 1966, Judge Spanton entered an order awarding respondent $70.00 per week alimony until the further order of the court and further ordered petitioner to pay respondent's attorney $1750.00 within 3 weeks for expenses pending the appeal (R. C292). Petitioner's special and limited appearance objecting to the jurisdiction of the court was disregarded. The trial judge ruled that petitioner was not entitled "in this proceedings" to enter a special and limited appearance (R. C292).

A new supersedeas and appeal bond ordered to be given with the name of the spouse of one surety, was presented September 27, 1966, approved by Judge Spanton and filed September 27, 1966 (R. C299-302). The order of contempt of September 15, 1966, was not in-

cluded in an amended notice of appeal by the maneuver of respondent's failure and refusal to prepare the corrected order of September 29, 1966 (R. C329). A petition for change of venue was denied petitioner by Judge Spanton (R. C338). On October 7, 1966, a minute order docket entry was entered by Judge Spanton for 10 days' servitude of petitioner for failure to appear.

On October 19, 1966, an order was entered allowing petitioner to amend the notice of appeal to include the subsequent and additional order of September 23, 1966 (R. C387-391). Petitioner is a dentist, and the repeated appearances of the sheriff in the dental office of petitioner to coerce payment of alimony and attorney fees forced petitioner to give an additional bond for the subsequent and additional order of September 23, 1966. Petitioner was ordered to file an additional bond in the amount of $5,000.00 within 10 days with the Clerk of the Circuit Court of Henry County (R. C396).

On October 20, 1966, petitioner filed the additional bond as ordered (R. C393-399, Case No. 42416). The bond was approved nunc pro tunc as of October 20, 1966 (R. C510). On October 20, 1966, the minute order docket entry for 10 days' servitude of petitioner then became the signed order of Judge Spanton (R. C415). On October 25, 1966, an order was entered by Judge Spanton for 6 months commitment of petitioner for wilful failure to pay alimony and attorney's fees under his order of September 23, 1966 (R. C460).

The divorce decree was not permitted on appeal by order of the trial judge "for the reason the time limitation had passed and for other reasons", (R. C329).

Upon objections by respondent, the divorce decree and all prior proceedings were excluded from the praecipe for record as designated by petitioner (R. C287).

On January 25, 1966, respondent filed a claim against the estate of a deceased surety, alleging $30,000 due and owing her on the appeal bonds (Appellant's brief filed in the Illinois Supreme Court, Appendix K, p. 14a).

On March 14, 1968, the Appellate Court rendered an opinion and ruled as follows (Appendix D, p. 26a):

> "The appeal of appellant, Edward J. Kazubowski, with respect to the decree for divorce is accordingly dismissed and the decree of August 31, 1966, as well as the orders of September 15, 1966, and September 23, 1966, are affirmed."

In distinguishing the case of *Davis* v. *Childers*, 33 Ill. 2d 297, from the instant case on appeal, the Appellate Court ruled (Appendix D, p. 22a):

> "This tort action is not a precedent to be applied in a divorce action where there is both a termination of the marriage and an independent, supplementary claim for property settlement even though the relief as to both is sought in one complaint. They are in fact separate claims."

With respect to the final decree for divorce, which was not on appeal by order of the trial court, and notwithstanding the exclusion of the final decree for divorce and all matters prior thereto from the record on appeal, the Appellate Court ruled:

> "Since on the basis of the record, there was such specific finding in the cause before us in compliance with section 50(2), the decree for divorce was final and appealable. In view of the fact that there was no appeal from such decree, that decree could not be reviewed on this appeal." (App. D, p. 23a).

The Appellate Court declined to review the order sustaining objections to petitioner's designation of the contents of the record on appeal. Referring to the final decree for divorce of June 13, 1966, the Appellate Court ruled:

> "Since we have determined that the June 13, 1966, decree was not appealed from, there was no occasion to have a review of the record prior to August 31, 1966. It is, therefore, unnecessary to determine whether or not defendant was inhibited or prevented from bringing that portion of the record to this Court on appeal. Such exclusion could not have been error under the record before us." (App. D, p. 25a).

With respect to the unauthorized stipulation, the Appellate Court ruled:

> "The parties admit that it was signed properly by attorneys for both parties at the time. Such stipulation in absence of a showing of fraud is binding upon the parties." (App. D, p. 23a).

With respect to the September 15, 1966 order of contempt, the Appellate Court ruled:

> "Defendant could have prevented the enforcement of such decree by a proper appeal under Section 82 of the Civil Practice Act (1965 Illinois Revised Statutes, Ch. 110, sec. 82) and the filing of bond. The appeal would then operate as a supersedeas. This was not done before the enforcement proceeding on September 15, 1966. Accordingly, the contempt order was valid." (App. D, p. 25a).

With respect to the September 23, 1966 order relating to equitable alimony, attorney's fees and expenses pending the appeal, the Appellate Court ruled:

> "The record before us is such that there is no showing made in this court that the trial court abused its

discretion in entering the order of September 23, 1966." (App. D, p. 26a).

The Appellate Court made no mention of the supersedeas approved in the trial court. The opinion did not rule on the propriety of the orders entered in defiance of the supersedeas, nor did the Appellate Court rule upon the orders for 10 days' servitude and six months commitment of the petitioner. The opinion did not mention the variances between the unauthorized stipulation and the property decree. The contested issue of the freehold was obscured.

Respondent, in her brief filed in the Appellate Court, at page 10, stated:

> "There is nothing to indicate the divorce decree in this case was not final and appealable and nothing to indicate that the notice of appeal could be filed after the expiration of the 30 days provided for filing."

Respondent, in her brief filed in the Appellate Court, at pages 11 and 12, stated:

> "There is no authority for the suggestion that an appeal from a divorce decree with a section 50 (2) finding can be taken after 30 days. . . . In *Van Dam* v. *Van Dam*, 21 Ill. 2d 212, 171 N.E. 2d 594, a petition to vacate a decree for divorce was filed after the expiration of 30 days . . . and the court said at page 599:
>
> ". . . 'In passing we observe that the rules with respect to the finality of judgments apply with full force and effect to decrees of divorce. *Sherer* v. *Sherer*, 334 U.S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429. . . .'
>
> "It was not reversible error to exclude matters before July 12, 1966, even if it be assumed they were

excluded. All such matters were immaterial because the notice of appeal was limited to the order entered August 31, 1966, and the time for appeal from the divorce decree had expired."

A material statement of fact is necessary at this point for a further understanding of the respondent's actions and proceedings and of the supersedeas suppressed in the opinions by the Appellate and Supreme Courts of Illinois. As stated under the heading of "Jurisdiction", the Appellate Court entered its order on October 16, 1968, staying its mandate upon the condition that petitioner file an additional bond in the amount of $20,000 and upon the further conditions as follows: (Appendix J, pages 11a, 12a and 13a of Appellant's principal brief filed in the Illinois Supreme Court):

". . . that defendant-appellant's supersedeas bonds heretofore filed and approved with the Circuit Court of Henry County and presently on file as part of the record in this case with the Clerk of this Court are to remain in full force and effect. . . ."

The amendment to motion for stay of mandate clearly establishes the Appellate Court was aware of the date of each appeal bond approved after vigorous challenging by the respondent. Petitioner filed the additional bond as ordered on October 24, 1968, and the bond was approved on the same date.

On October 28, 1968, the respondent conveyed her joint tenancy interest in the real estate to one Judith L. Rainey, secretary to Gregg A. Young, one of respondent's attorneys. The deed of conveyance was filed of record in the Office of the Recorder of Deeds on October 31, 1968, as appears in Appendix L, page 16a of Appellant's principal brief filed in the Supreme Court of Illinois. The

breach, repudiation and rescission of the "consent decree" was not considered by the Illinois Supreme Court.

On March 12, 1969, the mandate of the Appellate Court was filed in the trial court.

On March 19, 1969, petitioner filed pleadings for a determination of issues not determined by the Appellate Court, and for determination of issues in violation of the Divorce Act of Illinois and orders entered in violation of the supersedeas, and, for determination of the validity or invalidity of the supersedeas, and the breach, repudiation and rescission of the "consent decree" by the respondent pending the appeal. Petitioner realleged the lack of notice in the entering of the property decree and no opportunity to be heard at any time thereafter, but alleges that he is bound by the Appellate Court opinion. Petitioner prayed for a determination of whether respondent was equally bound by the Appellate Court opinion. The questions of lack of jurisdiction of the court to enter orders in defiance of the supersedeas and after the final divorce decree had been granted, were raised, (R. C586-593). No determination of the issues were made. On March 24, 1969, petitioner was taken into custody from his dental office by the Sheriff of Henry County, a deputy Sheriff and "State Police" under a contempt mittimus issued March 24, 1969 (R. C608-614). The contempt mittimus recited that on September 15, 1966, petitioner was ordered to be committed to the common jail for 6 months for failure to pay $4900 *alimony* and $500 attorney's fees and that a warrant for that purpose issue (R. C619). No warrant was issued.

No hearing was permitted petitioner on March 24, 1969 on the contested issues. No hearing was afforded

petitioner on March 25, 1969. Petitioner could obtain his freedom and liberty only upon payment of the sum of $14,000, which represented the amount due under Judge McNeal's orders of August 31, 1966 and September 15, 1966, with interest, "lumped off in round figures" (R. C630-648). Payment of $14,000 was made under duress by members of petitioner's family to obtain petitioner's liberty and freedom after 28 hours of imprisonment, otherwise petitioner to remain imprisoned (R. C616-622).

On April 15, 1969, petitioner filed a motion for the refund and restitution of the $14,000 obtained illegally and under duress. Violations of due process and equal protection of the laws were raised in the pleadings (R. C630-648). No hearing was had. Notice of appeal was filed April 18, 1969 (R. C653), and is Case No. 42321.

On April 28, 1969, the trial court entered the following orders:

1. Decree Re: supplemental attorneys fees, ordering petitioner to pay $9,497.99, under the order of September 23, 1966, within 10 days, while retaining jurisdiction for the purpose of granting further sums and expenses in this cause or in connection with this cause (R. C691);

2. Order for Citation and Rule to Show cause for wilful and contumacious failure to pay respondent $8,820 under the order of September 23, 1966 (R. C707);

3. Order regulating pleadings of petitioner to appeals only. By this order, the Clerk of the Court is ordered not to file any documents or papers or pleadings of petitioner further offered for filing unless pertaining with a present pending appeal or any appeal hereafter instituted (R. C709);

4. Oral order for the Sheriff to execute the "outstanding mittimus of October 7, 1966", for 10 days' servitude of petitioner (Docket entry of April 28, 1969, R. C782).

Appeals were taken on May 23, 1969 from the three signed orders entered April 28, 1969 (R. C716) and are Case No. 42415.

On May 2, 1969, shown filed as of May 7, 1969, an order of commitment of petitioner for imprisonment of six months was entered for "wilful and contumacious" refusal to pay $8,820 alimony, with interest, as required of petitioner under the order of September 23, 1966 (R. C711). Notice of appeal was filed May 26, 1969 (R. C723) and is Case No. 42416.

The opinion rendered by the Supreme Court of Illinois on March 24, 1970 (Appendix E, p. 35a) ruled:

> "The Appellate Court in this case has decided that all orders and decrees of the circuit court entered prior to the appeal are valid and enforceable. This court denied leave to appeal and the U.S. Supreme Court denied *certiorari*. Any possible questions of validity as well as those of jurisdiction of the subject matter or person are thus settled and the result is binding upon the parties."

With regard to the contempt mittimus on March 24, 1969, the Supreme Court ruled (Appendix E, p. 36a):

> "The contempt *mittimus* was issued pursuant to the command of the order entered by the trial court on September 15, 1966, which was specifically affirmed and held valid on appeal."

With regard to the order allowing supplemental attorney fees on April 28, 1969, the Supreme Court ruled (Appendix E, p. 37a):

> ". . . it should be observed that defendant's only defense to the motion was an objection to the jurisdiction of the court after a special and limited appearance."

With regard to the final decree for divorce and dissolution of the marriage of the parties, the Supreme Court ruled (Appendix E, pp. 37a-39a):

> "The contention made repeatedly by defendant that plaintiff was not the wife of defendant and therefore not entitled to the allowance was reasserted. The fact is that defendant's position in this respect is answered by the affirmance of the appellate court of the order of September 23, 1966, which was the original order allowing plaintiff alimony and attorney fees during the appeal. The disposition of this question of lack of marital status is inherent in the appellate court's decision. It could not legally be raised after remandment of the cause for reasons already stated. . . . The order for supplemental attorney fees is supported by the law and the evidence, was not obtained in violation of defendant's constitutional rights and should be affirmed."

With respect to the order to show cause for failure to pay equitable alimony under the order of September 23, 1966, the Supreme Court ruled that it was not a final and appealable order, and further ruled (Appendix E, pp. 38a-39a):

> "However it is a valid order since it is based directly upon the order of September 23, 1966, affirmed in the prior appeal".

With respect to the order regulating pleadings, the Supreme Court ruled (Appendix E, p. 39a):

> "As to the order regulating pleadings entered on the court's own motion it does not appear that an opportunity for a hearing on any pleading was denied

or that it had the effect of precluding defendant from filing any pleading he wished to file. It is purely administrative in character and if it is to operate as a denial of due process as defendant claims that has not as yet been demonstrated. Without a finding as provided in Supreme Court Rule 304, the order is not final and appealable".

With respect to the May 7, 1969 order finding defendant in contempt, the Supreme Court ruled (Appendix E, p. 39a):

"Much of what has been said relative to the order of April 28th, allowing supplemental attorney fees, applies as well to the order of May 2, 1969, finding defendant in contempt for his wilful and contumacious refusal to pay alimony as ordered by the court on September 23, 1966."

The Supreme Court further ruled:

"Appeals from the order to show cause and the order regulating the pleadings entered on April 28, 1969, are dismissed. All other orders from which appeals have been taken in these consolidated cases are affirmed."

The Illinois Supreme Court declined and refused to mention the sum of $50,000 given in appeal bonds as ordered by the trial court and the Appellate Court, approved as supersedeas.

The refusal to mention and rule upon the supersedeas leaves the orders entered in defiance of the supersedeas valid and binding until vacated or set aside.

REASONS FOR GRANTING THE WRIT

1. **Petitioner was deprived of due process of law by the minute order docket entry of approval by the trial judge of a document entitled "Stipulation" executed and signed by a person as "Perona and Perona", as attorneys for petitioner, which was not authorized and not known to petitioner until one week later and made known to the trial judge that the "Stipulation" was not authorized by petitioner.**

It is settled law in Illinois and elsewhere, that an attorney, by the fact of his representation of the client, has no implied authority to surrender or waive substantial rights of his client or to settle the case in which he appears for the client, but needs express authority. *Wetherbee* v. *Fitch*, 117 Ill. 67, 75 (1886); *Danziger* v. *Pittsfield Shoe Co.*, 204 Ill. 145, 149, 68 N.E. 534 (1903); *United States* v. *Beebe*, 180 U.S. 343, 354, 45 L. ed. 563, 21 S. Ct. 371, 374 (1901); 66 A.L.R. 102, 107, 108; *Fargo* v. *Engling*, 90 Ill. App. 2d 264, 269-270, 232 N.E. 2d 531 (1967).

The document entitled "stipulation" was used to deny petitioner a constitutional right.

2. **The trial judge deprived petitioner of due process of law by the entry of the separate and supplemental property decree without notice to petitioner and without an opportunity to be heard and to defend, during a hearing set by the respondent on a matter separate and distinct from the entry of a decree.**

On August 31, 1966, the only matter set before the Honorable Judge Dan H. McNeal, was the "motion to

amend the stipulation" as recited in the notice forwarded by the respondent. The refusal of the trial judge to allow a hearing on petitioner's motion, presented prior to the entry of any decree, was a gross violation of due process of law. A fundamental requirement of due process is "the opportunity to be heard". *Grannis* v. *Ordean*, 234 U.S. 385, 394, 58 L. Ed. 1362, 1369, 34 S. Ct. 779 (1914); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-314; 94 L. ed. 865, 872, 70 S. Ct. 652 (1950); *Armstrong* v. *Manzo*, 380 U.S. 545, 549-550, 14 L. ed. 2d 62, 85 S. Ct. 1187 (1965). *Durkin* v. *Hey*, 376 Ill. 292, 299-300 (1941); *Simon* v. *Craft*, 182 U.S. 427, 436, 45 L. ed. 1165, 1170, 21 S. Ct. 836 (1901).

The entry of the property decree was in violation of the Henry County Circuit Court Rules, Ch. 110, sec. 302.1 (Circuit Court Rule 2.1, Ill. Rev. Stat. 1965, Ch. 110, sec. 302.1) which provides in pertinent part:

(a) Notice required: ". . . Notice that additional relief has been sought shall be given in accordance with Supreme Court Rule 7-1."

(b) Contents of notice: ". . . If the motion is presented in writing a copy of the motion or a statement that it previously has been served shall be served with the notice. Copies of all papers presented to the court with the motion shall be served with the notice or the notice shall state that copies have been served."

(c) Time of Notice: ". . . If notice is given by mail, the notice shall be deposited in a United States Post Office. . . . on the third court day preceding the hearing on the motion."

Circuit Court Rule 7.1 (Ill. Rev. Stat. 1965, Ch. 110, sec. 307.1) provides:

> "Presentation of Drafts. When the court rules upon a motion other than in the course of trial or makes a final determination in an action, the attorney for the prevailing party shall prepare and present to the court the order, judgment, or decree to be entered, unless the court directs otherwise."

The property decree is entered August 31, 1966, and filed as of August 31, 1966.

The several material differences between the unauthorized stipulation and the decree establish clearly that the decree was founded upon neither consent nor legitimate adjudication. An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Armstrong* v. *Manzo*, 380 U.S. 545, 550 (1965).

There was a flagrant denial of due process of law under both Constitutions.

3. The trial judge deprived petitioner of due process and equal protection of the laws by summarily finding petitioner in contempt of court, in absentia, for failure to comply on September 1, 1966, with the terms of a property decree, during a hearing on amended objections and motion to vacate the property decree.

This order is in direct conflict with the decision of this Court in *Hovey* v. *Elliott*, 167 U.S. 409, 413-415, 42 L. ed. 215, 17 S. Ct. 841 (1897), wherein this Court stated that a court possessing plenary power to punish for contempt may not, on the theory of punishing for contempt, summarily deprive a party of all right to defend the action.

The order is in direct conflict with the decisions of the Supreme Court of Illinois. *Hohenadel* v. *Steele*, 237 Ill. 229, 236 (1908); *Walter Cabinet Co.* v. *Russell*, 250 Ill. 416, 421-422 (1911); *Porter* v. *Alexenburg*, 396 Ill. 57, 63-64 (1947); *People ex rel. Andrews* v. *Hassakis*, 6 Ill. 2d 463, 466 (1955).

The order is in direct violation of the statutes of Illinois. Section 50(6) of the Illinois Civil Practice Act (Ill. Rev. Stat. 1965, Chapter 110, sec. 50(6)) provides in part:

> "The court . . . may on motion filed within 30 days after entry thereof set aside any final order, judgment or decree upon any terms and conditions that shall be reasonable."

Section 68.3(2) of the Illinois Civil Practice Act (Ill. Rev. Stat. 1965, Ch. 110, sec. 68.3(2)) provides:

> "A motion filed in apt time stays execution, and the time for appeal from the decree or judgment does not begin to run until the court rules upon the motion."

Petitioner's objections, amended objections and motion to vacate the property decree were timely made and had the effect of staying execution until the trial court ruled upon the objections and motion to vacate. *Harris* v. *Spencer*, 86 Ill. App. 2d 41, 48, 229 N.E. 2d 16, 19 (1967); *Light* v. *Light*, 12 Ill. 2d 502, 513 (1958).

The summary contempt order deprived petitioner of all right to defend the action. The burden of proof was thus shifted upon petitioner and he has been denied the right to be heard at all times thereafter.

Again there was a denial of due process and equal protection of the laws:

4. The trial judge denied petitioner due process and equal protection of the laws by the order allowing petitioner 5 days in which to present an appeal bond in the amount of $25,000 for approval of the court to act as a supersedeas.

This order was excessive, unreasonable and discriminatory to petitioner. Supersedeas on appeal is provided by statute (Ill. Rev. Stat. 1965, Ch. 110, sec. 82(1)), and allows for 30 days or within any further extended time allowed by the trial court. The approval and filing of the bond prevented the court from entering any further order in the execution of the property decree. *Hohenadel* v. *Steele*, 237 Ill. 229, 235-236 (1908); *Kohler* v. *Kohler*, 326 Ill. App. 105, 111, 61 N.E. 2d 687 (1945); *Bissett* v. *Bissett*, 309 Ill. App. 134, 32 N.E. 2d 919 (1941). The jurisdiction of the Appellate Court attached instanter upon filing the notice of appeal and the Circuit Court was thereupon deprived of jurisdiction. *People ex rel. Daly* v. *Dusher*, 24 Ill. 2d 309, 310 (1962); *Brehem* v. *Piotrowski*, 409 Ill. 87, 90 (1951).

Again petitioner was denied due process and equal protection of the laws.

5. The trial court lacked power and jurisdiction to award the respondent alimony when the respondent had been awarded a final decree of divorce by the trial court on June 13, 1966.

The respondent, by her own voluntary acts, revised the decree of divorce on June 13, 1966, to make it a final appealable order. Absent the appeal by petitioner within the 30-day period, the status of the parties was fundamentally changed. The respondent admits the divorce decree was final in her brief filed in the Appellate Court, Third District, Case No. 66-101, at pages 11 and 12. The

Appellate Court opinion ruled the divorce decree was final as of June 13, 1966. At page 12 of respondent's brief filed in the Appellate Court, she stated the decree of August 31, 1966, was a consent decree not subject to appeal, and further stated:

> "This appeal is taken from the decree of August 31, 1966 providing for a complete property settlement between the plaintiff and defendant."

Paragraph 5 of the unauthorized stipulation provides that $5,000 shall be in lieu of and in full satisfaction of all rights to alimony. Page 4 of the property decree provides (R. C158):

> "That except as provided herein, the plaintiff is permanently barred from any and all additional rights to alimony."

The Divorce Act of Illinois is a special statute, and while the Circuit Courts of Illinois may exercise their powers within the limits of the jurisdiction conferred by the statute, the jurisdiction depends upon the grant of the statute and not upon general equity powers. *Johnson* v. *Johnson*, 381 Ill. 362, 370 (1943); *Smith* v. *Smith*, 334 Ill. 370, 379-380 (1929); *Kohler* v. *Kohler*, 326 Ill. App. 105, 110 (1945).

In *Schwarz* v. *Schwarz*, 27 Ill. 2d 140, 149 (1963), the Supreme Court of Illinois stated:

> "In 1949, section 18 of the Divorce Act relating to alimony was amended . . . The plain and unmistakable purpose of the amendment was to authorize a court in a divorce action to compel the conveyance of property from one spouse to the other as a settlement in lieu of alimony."

In the instant case, the property decree specifically provided that the respondent's name remain on the prop-

erty as a joint tenant. Former section 18, now section 19 of the Illinois Divorce Act (Ill. Rev. Stat. 1965, Ch. 40, sec. 19) specifically provides that "no such order (for alimony) subsequent to the decree may be made in any case in which the decree recites that there has been an express waiver of alimony or a money or property settlement in lieu of alimony". *Johnson* v. *Johnson*, 381 Ill. 362, 370 (1943); *Larson* v. *Larson*, 2 Ill. 2d 451, 453 (1954). *Smith* v. *Johnson*, 321 Ill. 134, 140-141 (1926).

The order of September 23, 1966, awarding respondent alimony is against public policy and morals, in violation of the Divorce Act of Illinois, and in violation of the statutes pertaining to supersedeas.

Again petitioner was denied due process and equal protection of the laws.

6. The trial court lacked power and jurisdiction to award the respondent attorney fees and expenses pending an appeal from the property decree.

Section 16 of the Illinois Divorce Act (Ill. Rev. Stat. 1965, Ch. 40, sec. 16) presupposes the existence of the marriage relation. It does not authorize attorney's fees in connection with an appeal from an order which does not affect the marital realtion. *Smith* v. *Johnson*, 321 Ill. 134, 139-140 (1926); *Bissett* v. *Bissett*, 309 Ill. App. 134 (1942); *Kohler* v. *Kohler*, 326 Ill. App. 105, 111, 61 N.E. 2d 687 (1945); *Simon* v. *Balasic*, 316 Ill. 442 (1942); *Gerson* v. *Mathes*, 252 Ill. App. 607, 610-612 (1929).

The order of September 23, 1966, awarding respondent attorney's fees and expenses pending an appeal from an order not affecting the marital relation is in violation of the Illinois Divorce Act and in violation of the stat-

utes pertaining to supersedeas. The property decree provided that each of the parties shall pay their own attorney's fees and each party to pay their respective expenses incurred since November 20, 1965, and that each party was barred from any rights of dower, homestead or of any other kind in the property of the other, except the property held in joint tenancy by the respondent for the payment of the money due under the stipulation.

Again petitioner was denied due process and equal protection of the laws.

7. The Appellate Court lacked jurisdiction to rule that the property decree of August 31, 1966, was a consent decree.

A "consent decree" derives its validity from the consent of the parties, not from adjudication, and is treated as a contract. *Cwik* v. *Condre*, 4 Ill. App. 2d 380, 384 (1954); *James* v. *James*, 14 Ill. 2d 295, 305-306 (1958); *Sears* v. *Schukat*, 358 Ill. 27, 36 (1934); 49 C.J.S., Judgments, sec. 174 b, page 311; 46 Am. Jur. 2d, Judgments, Section 657, pages 812-815. A decree so entered by consent cannot be reviewed by appeal. *Sims* v. *Powell*, 390 Ill. 610, 617-618 (1945). There is no power conferred upon the Appellate Courts by the Constitution or laws of Illinois to affirm a "consent decree". The appeal of petitioner was, in effect dismissed.

The statement of the Appellate Court that an unauthorized stipulation cannot be withdrawn or repudiated unilaterally is a palpable legal error (Appendix D, p. 24a); and its statement that "The parties admit that it was signed properly by attorneys for both parties at the time", is a palpable factual error (Appendix D, p. 23a).

8. The affirmance of the order awarding respondent alimony, attorney fees and expenses pending the appeal was in excess of the power and jurisdiction conferred upon the Appellate Courts of Illinois.

The affirmance of the order of September 23, 1966 by the Appellate Court is contrary to public policy, in violation of the Illinois Divorce Act and in violation of the statutes pertaining to supersedeas. The terms of the "consent decree" and the affirmance of the September 23, 1966 order cannot legally co-exist. This was clearly a penalty upon petitioner for taking an appeal to obtain due process of law denied him up to that point of time in the trial court. The Appellate Court transcended the limits of its authority and the order is void. *Windsor* v. *McVeigh*, 93 U.S. 274, 283 (1876); *Armstrong* v. *Obucino*, 300 Ill. 140, 143 (1921). The opinion rendered is in violation of Article III of the Illinois Constitution.

Again petitioner was denied due process and equal protection of the laws.

9. Petitioner was denied due process and equal protection of the laws by the Appellate Court in affirming the summary contempt order of September 15, 1966.

It is a violation of due process for the reviewing court to find petitioner liable on issues not contested in the trial court. *Saunders* v. *Shaw*, 244 U.S. 317, 320 (1917). It is a denial of due process to prevent an individual from defending the petition for citation. *Hovey* v. *Elliott*, 167 U.S. 409, 413-414 (1897).

10. Petitioner was denied due process and equal protection of the laws by the refusal of the Appellate Court to review the proceedings in the trial court.

The right of review by the Appellate Court was an integral part of petitioner's right to due process and equal protection of the laws. As such, it falls within the protection given by the 14th Amendment to the Constitution. *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956); *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948); *Doud* v. *United States*, 340 U.S. 206, 208 (1951); *Rinaldi* v. *Yeager*, 384 U.S. 305, 310 (1966); *Bagdonas* v. *Liberty Land & Investment Co.*, 309 Ill. 103, 108 (1923); *Fuhlhouser* v. *Randolph*, 287 Ill. 94, 105 (1919).

The opinion is in violation of Ill. Rev. Stat. 1965, Ch. 110, sections 74(1), 82(1), 101.33(5), 101.36(1)(a), 101.36(2)(a) and 101.37(6).

11. The suppression and omission of the supersedeas in the opinion of the Appellate Court was for improper and corrupt means and deprived petitioner of liberty and property without due process and equal protection of the laws.

The Appellate Court was clearly aware of the supersedeas approved in the trial court. The order directing petitioner to file an additional bond in the amount of $20,000, while further ordering that the supersedeas approved in the trial court remain in full force and effect, was entered for improper means. (See Appendix J, pp. 11a-13a of Brief and Argument of Appellant filed in the Illinois Supreme Court, and Petition for Rehearing, pages 11, 12 and 13).

Again petitioner was denied due process and equal protection of the laws.

12. The Supreme Court of Illinois lacked power and jurisdiction or exceeded the powers conferred upon it by the Constitution, to affirm the judgment of the Appellate Court and the orders entered pursuant to that judgment and denied petitioner due process and equal protection of the laws.

It is manifest that the constitutional questions raised as to the lack of jurisdiction of the Appellate Court to render the opinion, necessarily applies to the lack of jurisdiction of the Illinois Supreme Court in affirming that opinion, and the orders of the trial court, pursuant to the opinion. The statement by the Illinois Supreme Court, impliedly suggesting the denial of the petition for writ of certiorari to the United States Supreme Court is a factor as to the validity of the jurisdiction of the subject matter or person, and the result is binding upon the parties, is palpably erroneous. (Appendix E, p. 35a).

This Court has held that the denial of a writ of certiorari does not import any expression of views by the Court concerning the merits of the case or whether the case was correctly decided below. *United States* v. *Carver*, 260 U.S. 482, 490, 67 L. ed. 361, 364, 43 S. Ct. 181, 182 (1923); *Sunal* v. *Large*, 332 U.S. 174, 181, 91 L. ed. 1982, 1988, 67 S. Ct. 1588, 1592 (1947); Memorandum of Mr. Chief Justice Warren in *Martin* v. *Texas*, 382 U.S. 928, 15 L. ed. 2d 340, 86 S. Ct. 307 (1965).

An issue which questions the power of the court to enter a judgment, inasmuch as it goes to the jurisdiction of the court, can be raised at any time after judgment is entered. *Scott* v. *Freeport Motor Casualty Co.*, 379 Ill. 155, 160 (1942); *Toman* v. *Park Castles Apt. Bldg. Corp.*, 375 Ill. 293, 302 (1941). A judgment entered with-

out power to enter the particular judgment is void. *Harvey v. Elliott*, 167 U.S. 409, 444-445 (1897); *Earle v. McVeigh*, 91 U.S. 503, 507, 23 L. ed. 398, 400 (1876); *Spalding v. Vilas*, 161 U.S. 498, 16 S. Ct. 631, 635 (1896); *Windsor v. McVeigh*, 93 U.S. 274, 282-283, 23 L. ed. 914 (1876); *Armstrong v. Obucino*, 300 Ill. 140, 143 (1921); *United States v. Walker*, 109 U.S. 258, 265-266 (1883).

The opinion rendered by the Illinois Supreme Court was a discriminatory denial of the right of appeal and is condemned by the due process and equal protection clause. *Griffin v. Illinois*, 351 U.S. 12, 18, 19 (1956); *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *Dowd v. United States*, 340 U.S. 206, 208 (1951); *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966). The opinion rendered is in violation of sections 2, 6, 12 and 19 of Article II of the Illinois Constitution. The opinion rendered is in violation of Article III of the Illinois Constitution. The opinion is in direct violation of the Divorce Act of Illinois and the statutes pertaining to supersedeas.

Again petitioner was denied due process and equal protection of the laws.

(A) The imprisonment of petitioner on March 24 and 25, 1969, was based upon an improper and illegal contempt mittimus and void orders, as was the order of payment on March 25, 1969, and deprived petitioner of liberty and property without due process and equal protection of the laws.

The imprisonment of petitioner was a violation of the constitutional prohibition against imprisonment for debt (Section 12, Article II of the Illinois Constitution). *People v. LaMothe*, 331 Ill. 351, 356 (1928); *LaRue v. LaRue*, 341 Ill. App. 411, 416 (1950). The constitutional prohibi-

tion against imprisonment for debt applies only to contracts, express or implied. *People* v. *Walker*, 286 Ill. 541, 542 (1919); *Parker* v. *Follensbee*, 45 Ill. 473, 478 (1867). Petitioner was entitled to a hearing, *People* v. *Lowe*, 389 Ill. 531, 537-538 (1942).

The relationship of petitioner and respondent on September 15, 1966, was at most, that of debtor and creditor. There was no alimony due to the respondent.

The refusal to afford petitioner a hearing on the contested issues was a gross violation of due process under both Constitutions.

The arrest, without a warrant was in violation of the Illinois Criminal Code (Ill. Rev. Stat. 1969, Ch. 38, sections 109-1; 109-3(a).)

The arrest made without a warrant and under color of state law, was in violation of 42 U.S.C., section 1983, *Joseph* v. *Rowlen*, 402 F. 2d 367, 370 (C.A. 7th) (1968). The arrest was in violation of section 6, Article II of the Illinois Constitution and in violation of the Fourth Amendment to the United States Constitution. The sum of $14,000 obtained under duress should be restored to the petitioner. *Feingold* v. *Feingold*, 345 Ill. 203, 209 (1931).

Again petitioner was denied due process and equal protection of the laws.

Petitioner's attorney should not be threatened and intimidated with proceedings to be taken by the State Bar Association if an appeal is taken from the order of payment and discharge on March 25, 1969.

(B) The order for supplemental attorney fees was entered in excess of the powers and jurisdiction conferred upon the trial court and was a violation of due process and equal protection of the laws.

This order is contrary to the terms of the "consent decree". It is in violation of the Illinois Divorce Act and in violation of the statutes pertaining to supersedeas. The order is entered under the original number of the divorce action commenced in November, 1965, and has for its basis the order of September 23, 1966, as clearly established by the mere filing of the supplemental petition for attorney fees by the respondent on March 19, 1969 (R. C595-597).

(C) The order to show cause for failure to pay alimony was a subterfuge for the entry of the order entered May 7, 1969, and was entered for improper motives to deprive petitioner of liberty and property without due process and equal protection of the laws.

This order was merely a subterfuge for an order to be entered thereafter, when petitioner would be prohibited and prevented from filing any further defenses in objecting to the jurisdiction of the court and questioning the suppression of the supersedeas.

(D) The order regulating pleadings of petitioner was a violation of due process of law and entered for improper motives.

This Court in *Hovey* v. *Elliott*, 167 U.S. 409, 446, stated that it is a denial of due process of law to refuse to permit a defendant to be heard in his defense, and indeed by striking the pleadings containing such defense from the files. There is no difference in the order regulating the pleadings of petitioner to appeals only, from

striking pleadings containing such defense from the files. Both accomplish the same result of prohibiting and preventing a defendant from raising a defense.

The order was entered for improper motives and is clearly established from the proceedings in the trial court thereafter. An order of default of petitioner was entered which recites "that the complaint to foreclose herein be taken as confessed against said petitioner". There is no complaint on file, and petitioner's only remedy is to appeal. This is case No. 43081 in the Illinois Supreme Court.

(E) The order of May 7, 1969, for six months commitment of petitioner for failure to pay $8,820 alimony to respondent as required of petitioner under the order of September 23, 1966, was entered in excess of the power and jurisdiction conferred upon the court and was a violation of due process and equal protection of the laws.

Petitioner restates his allegations as to the order of September 23, 1966 having been entered in violation of the Divorce Act of Illinois, in violation of the statutes pertaining to supersedeas and contrary to public policy.

13. The suppression of $50,000 in appeal bonds, approved as supersedeas and omitted in the opinion rendered by the Supreme Court of Illinois was for corrupt and improper means.

A suppression of any part of the record is in derogation of procedural due process unless the same be based upon executive privilege or national security. *Lechich* v. *Rinaldi*, 246 F. Supp. 675, 684 (D. N.J.) (1965). Suppression of the supersedeas and orders entered in defiance thereof, are a violation of the equal protection clause of the Fourteenth Amendment. *Cochran* v. *Kansas*,

316 U.S. 255, 257-258, 86 L. ed. 1453, 62 S. Ct. 1068 (1942).

The State of Illinois seeks to gain, among other things, $50,000 on the appeal bonds by allowing respondent to seek recovery of money on those orders awarded to her in repeated defiance of the supersedeas. The respondent has been awarded a claim against the estate of a deceased surety and awarded a summary judgment, with award of execution, against the living sureties. This is Case No. 43335 in the Supreme Court of Illinois. Case No. 43368 is pending in the Illinois Supreme Court and Case No. 42832 in the Illinois Supreme Court has been transferred to the Appellate Court, Third District.

The Illinois Supreme Court has clearly denied petitioner due process and equal protection of the laws.

14. The opinions rendered by the Appellate Court and Supreme Court of Illinois violate the "Supremacy Clause" of the United States Constitution.

The Supremacy Clause of the United States Constitution requires that the Illinois Circuit Courts hear and determine the federal constitutional and statutory defenses raised by petitioner. *Robb* v. *Connolly*, 111 U.S. 624, 637 (1884).

Petitioner has not been afforded a hearing in this cause since June 2, 1966.

15. A due process violation has been accomplished by the Illinois State Judiciary.

A due process violation is none the less clear when that result is accomplished by the state judiciary. The federal guaranty of due process extends to state action

through its judicial as well as through its legislative, executive or administrative branch of government. *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, 680 (1930). While it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judicial or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. *Brinkrehoff-Faris Co.* v. *Hill*, *supra*, at page 682.

The state judiciary has deprived petitioner of all existing remedies for the enforcement of his rights.

CONCLUSION.

This case involves substantial federal questions.

There have been substantial denials of the constitutional rights of the petitioner. The case has been decided against him without his ever having an opportunity to be heard and to defend. It is the greatest human right that a litigant have an opportunity to be heard and to protect and to defend his liberty and property, and to have the equal protection of the laws. Absent those rights, and there is total confusion, frustration, multiplicity of actions and appeals as in this case. Jurisdiction is questioned in this petition because the lack of jurisdiction has resulted in grave and serious hardships, damage and loss to the petitioner, including his profes-

sional practice of dentistry because of the inability to carry out the orders of the trial court and the denial to be heard. The refusal of the Supreme Court of Illinois to determine the orders entered in defiance of the $50,000 in appeal bonds, in itself, is a gross violation of a fair review on appeal.

In order that justice may be done, this Court should take jurisdiction. It is the last hope of the petitioner.

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

EDWARD J. KAZUBOWSKI,

Pro Se.

APPENDIX A

Constitutions

Constitution of the United States:

Article VI, Clause 2 (the "Supremacy Clause") provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

Section 1. * * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Illinois.

Article II

Bill of Rights

Section 2. No person shall be deprived of life, liberty or property without due process of law.

Section 6. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized.

Section 12. No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors, in such manner as shall be prescribed by law, or in cases where there is strong presumption of fraud.

Section 19. Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obligated to purchase it, completely and without denial, promptly, and without delay.

Article III

Distribution Of Powers

Departments of government

The powers of the government of this state are divided into three distinct departments—the legislative, executive and judicial; and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

APPENDIX B

Statutes

Federal Statute: Civil Rights Act.

42 U.S.C.A., Section 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereto to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979.

Illinois Statutes:

Illinois Civil Practice Act: Article I, Chapter 110, sec. 1, Ill. Rev. Stat. 1965, 1969:

Section 1. The provisions of this Act apply to all civil proceedings, both at law and in equity, except in (enumerated cases) or other proceedings in which the procedure is regulated by separate statutes. In all those proceedings the separate statutes control to the extent to which they regulate procedure, but this Act applies as to matters of procedure not so regulated by separate statutes. As to all matters not regulated by statute or rule of court, the practice at common law and in equity prevails. (Amended by Act approved August 9, 1963) (Effective January 1, 1964).

Ill. Rev. Stat. 1969, Chapter 38, Code of Criminal Procedure:

Section 109-1: Person Arrested:

(a). A person arrested without a warrant shall be taken without unnecessary delay before the

nearest and most accessible judge in that county, and a charge shall be filed. A person arrested on a warrant shall be taken without unnecessary delay before the judge who issued the warrant or if he is absent or unable to act before the nearest or most accessible judge in the same county.

(b) The judge shall:

(1) Inform the defendant of the charge against him and shall provide him with a copy of the charge.

(2) Advise the defendant of his right to counsel and if indigent shall appoint a public defender or licensed attorney at law of this State to represent him in accordance with the provisions of Section 113-3 of this Code.

(3) Hold a preliminary hearing in those cases where the judge is without jurisdiction to try the offense; and

(4) Admit the defendant to bail in accordance with the provisions of Article 110 of this Code.

Section 109-3: Preliminary Examination

(a) The judge shall hold the defendant to answer to the court having jurisdiction of the offense if from the evidence it appears there is probable cause to believe an offense has been committed by the defendant.

Illinois Divorce Act (Ill. Rev. Stat. 1965, Ch. 40):

Section 5. Jurisdiction.

The circuit courts of the respective counties shall have jurisdiction in all cases of divorce and alimony allowed by this act.

Section 7. Process—Practice—Proceedings.

The process, practice and proceedings under this Act shall be the same as in other civil cases, ex-

cept as otherwise provided by this Act, or by any law or rule of court.

Section 16. Temporary alimony—Suit money—Attorney's fees—Enforcement.

In all cases of divorce the court at any time after service of summons and proper notice to the husband or wife may require the husband to pay to the wife or pay into the court for her use or may require the wife to pay to the husband or pay into the court for his use during the pendency of the suit such sum or sums of money as may enable her or him to maintain or defend the suit; and in every suit for a divorce the wife or the husband when it is just and equitable, shall be entitled to alimony during the pendency of the suit, provided that no order or decree for alimony shall be entered until the court has determined from evidence the condition in life of the parties and their circumstances. The court may, in its discretion reserve the question of the allowance of attorney's fees and suit money until the final hearing of the case and may then make such order with reference thereto as may seem just and equitable, regardless of the disposition of the case. In case of appeal by the husband or wife, the court in which the decree or order is rendered may grant and enforce the payment of such money for her or his defense and such equitable alimony during the pendency of the appeal as to such court shall seem reasonable and proper. Provided, that in divorce proceedings in which either spouse petitions for alimony during the pendency of the suit, or for

attorney's fees or suit money before the case has been finally adjudicated, and a complaint or counterclaim has been filed in such divorce suit by the party not so petitioning, making charges which, if sustained by proof, would entitle the respondent to such petition for alimony to a decree of divorce, the court shall have discretion to allow such temporary alimony or attorney's fees or suit mony, but upon application of the respondent shall conduct forthwith a preliminary hearing to ascertain whether it is probable that the respondent can sustain such charges; and if the court finds that it is probable that the respondent can sustain such charges, then such temporary alimony or attorney's fees or suit money may, within the discretion of the court, be granted or denied, or reserved until the final hearing of the case.

In all actions for divorce in which the court grants to the wife or husband, as the case may be, attorney's fees in the prosecution or defense of the action, as the case may be, such fees may, in the discretion of the court, be made payable in whole or in part, to the attorney entitled thereto, and judgment may be entered and execution levied accordingly.

Whoever wilfully refuses to comply with the court's order to pay alimony during the pendency of the suit or attorney's fees and suit money, may be declared by the court in contempt of the court and punished therefor, provided, that no alimony shall accrue during the period in which a party is imprisoned for failure to comply with the court's order.

Section 19. Permanent alimony—Custody and support of children—Modification of decree—Enforcement.

When a divorce shall be decreed, the court may make such order touching the alimony and maintenance of the wife or husband, the care, custody and support of the children, or any of them as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just. The court may order the husband or wife, as the case may be, to pay to the other party such sum of money, or convey to the party such real or personal property, payable or to be conveyed either in gross or by installments as settlement in lieu of alimony, as the court deems equitable. Irrespective of whether the court has or has not in its decree made an order for the payment of alimony or support, it may at any time after the entry of a decree for divorce, upon obtaining jurisdiction of the person of the defendant by service of summons or proper notice, make such order for alimony and maintenance of the spouse and the care and support of the children as, from the evidence and nature of the case, shall be fit, reasonable and just, but no such order subsequent to the decree may be made in any case in which the decree recites that there has been an express waiver of alimony or a money or property settlement in lieu of alimony or where the court by its decree has denied alimony. In any order entered pursuant to this section, the court may order the defendant to give reasonable security for such alimony and maintenance or such money or property settlement, or may enforce the payment of such alimony and maintenance or such money or prop-

erty settlement in any other manner consistent with the rules and practices of the court, where a party wilfully refuses to comply with the court's order to pay alimony and maintenance or to perform such money or property settlement, or has shown himself unworthy of trust. No alimony or separate maintenance shall accrue during the period in which a party is imprisoned for failure to comply with the court's order. A party shall not be entitled to alimony and maintenance after remarriage; but regardless of remarriage by such party or death of either party, such party shall be entitled to receive the unpaid installments of any settlement in lieu of alimony ordered to be paid or conveyed in the decree. The court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance, and the care, custody and support of the children, as shall appear reasonable and proper. As amended by act approved July 27, 1949.

Ill. Rev. Stat. 1965, Chapter 110, Section 50, Judgments and decrees.

Section 50(2).

If multiple parties or multiple claims for relief are involved in an action, the court may enter a final order, judgment or decree as to one or more but fewer than all of the parties or claims only upon an express finding that there is no just reason for delaying enforcement or appeal. In the absence of that finding, any order, judgment or decree which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not

terminate the action, is not enforceable or appealable, and is subject to revision at any time before the entry of an order, judgment or decree adjudicating all the claims, rights and liabilities of all the parties.

Section 50(6).

The Court may in its discretion, before final order, judgment or decree, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order, judgment or decree upon any terms and condtions that shall be reasonable.

Ill. Rev. Stat. 1965, Chapter 110, Section 68.3. Motions after decree or judgment in non-jury cases.

Section 68.3(2).

A motion filed in apt time stays execution, and the time for appeal from the decree or judgment does not begin to run until the court rules upon the motion.

Ill. Rev. Stat. 1965, Chapter 110, Section 74. Method of review.

Section 74(1).

Every order, determination, decision, judgment or decree reviewable by the Supreme or Appellate Courts of this State is subject to review by notice of appeal. The review shall be designated an appeal and constitutes a continuation of the proceeding in the trial court. The appeal presents to the reviewing court all issues which heretofore have been presented by appeal and writ of error. The right heretofore possessed by any person not a party to the record to review a judgment or decree by writ of error is preserved by notice of appeal.

Ill. Rev. Stat. 1965, Chapter 110, Section 82(1). Supersedeas.

Section 82. Appeal—Supersedeas—Bond—Stay and recall of mandate.

(1) An appeal to the Appellate or Supreme Court operates as a supersedeas only if and when the appellant, after notice, gives and files a bond in a reasonable amount, to secure the adverse party. If the bond is given before the record is filed in the reviewing court, the amount and terms thereof shall be fixed and the security approved by the trial judge or his successor, or where that is impossible because of his absence from the district, sickness or other disability then by any other judge of the court, and the bond shall be filed in that court. If the bond is given after the record is filed in the reviewing court, the amount and terms thereof shall be fixed and the security approved by the reviewing court or any judge thereof in vacation, and the bond shall be filed in the reviewing court. If the appeal is from a judgment or decree for the recovery of money, the condition of the bond shall be for prosecution of the appeal and the payment of the judgment, interest, damages and costs in case the judgment is affirmed. In all other cases the condition shall be fixed with reference to the character of the judgment, order or decree appealed from. After the record is filed in the reviewing court, that court or any judge thereof in vacation upon motion may change the amount or terms or the security of the bond whether fixed by it or by the trial judge, and failure to comply with the order of the reviewing court or judge shall terminate the super-

sedeas. If notice of appeal is filed within 30 days after the entry of the order, determination, decision, judgment or decree complained of, and if bond is given, filed and approved within 30 days after the entry; or within any further extended time allowed by the trial or reviewing court within the 30 day period or any extensions thereof, the notice of appeal, upon the approval of the bond, operates as a supersedeas. Unless the parties so stipulate no single extension or aggregate of extensions by the trial court shall exceed 45 days. After the expiration of the 30 day period or proper extensions thereof, no appeal operates as a supersedeas except upon order of the reviewing court or a judge thereof in vacation.

Ill. Rev. Stat. 1965, Chapter 110, Section 101.33 (Supreme Court Rule 33). Form and Contents of Notice of Appeal.

Section 101.33(5).

It may on written motion be amended to supply any of the foregoing requisites which may have been omitted or incorrectly stated. If the record on appeal has been transmitted to the reviewing court, the application for leave to amend the notice of appeal shall be made in that court, otherwise application shall be made in the trial court. Amendments relate back to the time of the filing of the notice of appeal. No amendment to the notice of appeal, specifying and describing orders, determinations, decisions, judgments, decrees or parts thereof not specified or described in the original notice of appeal shall be permitted after the expiration of 60 days from their entry. As amended Dec. 2, 1963, effective Jan. 1, 1964.

Ill. Rev. Stat. 1965, Chapter 110, Section 101.36 (Supreme Court Rule 36). The Record on Appeal.

Section 101.36(1) Praecipe for Record:

(a) Praecipe practice. In appeals taken directly to an Appellate Court or to this court, the appellant shall, within 10 days after the notice of appeal has been filed, prepare and file a praecipe with the clerk of the trial court, with proof of service of a copy on the appellee or his attorney, in which appellant shall designate what parts of the trial court record are to be incorporated in the record on appeal. The appellee, or co-party prosecuting a separate appeal, shall within 5 days after being so served, file a praecipe for any additional parts of the record that he may desire to have incorporated in the record on appeal, with proof of service of a copy upon each party or attorney or firm of attorneys who signed the notice of appeal.

Section 101.36(2) Content and Filing of the Record on Appeal.

(a) Arrangement of record. The record on appeal shall be arranged in chronological order substantially as follows: process and service, pleadings, orders, motions, affidavits, verdict in jury trials, the judgment or decree, the report of proceedings at the trial, the master's report and depositions, notice of appeal and praecipe for record, together with proof of service thereof, and appeal bond in case one has been given. No assignment of errors or cross-errors is necessary. As soon as the necessary copies or originals of all the records and documents specified in the praecipe are in possession of the clerk

of the trial court, he shall immediately make up the record on appeal by attaching together all of said records and documents specified in the praecipe, and number the pages consecutively.

Ill. Rev. Stat. 1965, Chapter 110, Section 101.37 (Supreme Court Rule 37). Supersedeas in Reviewing Court. Section 101.37(6).

Whenever a notice of appeal is amended so as to specify orders, determinations, decisions, judgments, decrees or parts thereof not specified in the original notice of appeal, a supersedeas entered on the original notice of appeal does not extend to the additional orders, determinations, decisions, judgments, decrees of parts thereof. The amended notice of appeal operates as a supersedeas as to the additional orders, determinations, decisions, judgments, decrees or parts thereof only upon motion made and bond given, conditioned as provided by law, within 10 days from the day the amended notice of appeal is filed, or any extended time granted within the 10 day period or any extensions thereof. If the record on appeal has been filed in the reviewing court, the motion for supersedeas and all other proceedings shall be had in that court. In all other respects, seeking and granting of supersedeas shall be as in cases of supersedeas on original notices of appeal.

APPENDIX C

Rules of Court

Ill. Rev. Stat. 1967, 1969, Chapter 110A, Section 304 (Supreme Court Rule 304).

Supreme Court Rule 304: Judgments as to Fewer than all Parties or Issues.

If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying enforcement or appeal. Such a finding may be made at the time of the entry of the judgment or thereafter on the court's own motion or on motion of any party. The time for filing the notice of appeal shall run from the entry of the required finding. In the absence of such a finding, any judgment that adjudicates fewer than all the parties is not enforceable or appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of all the parties.

Ill. Rev. Stat. 1965, Chapter 110, Section 302.1 (Circuit Court Rule 2.1).

Notice of Hearing of Motions.

(a) Notice required. Except in actions appearing on the daily trial call or during the course of trial, written notice of the hearing of all motions

shall be given to all parties who have appeared and have not theretofore been found by the court to be in default for failure to plead, and to all parties whose time to appear has not expired on the date of notice. Notice that additional relief has been sought shall be given in accordance with Supreme Court Rule 7-1.

(b) Contents of notice. The notice of hearing shall show the title and number of the action, the name of the judge before whom and the date when the motion will be presented. If the motion is made orally, the notice shall state the nature of the motion. If the motion is presented in writing, a copy of the motion or a statement that it previously has been served shall be served with the notice. Copies of all papers presented to the court with the motion shall be served with the notice or the notice shall state that copies have been served.

(c) Manner of service. Notice shall be given in the manner and to the persons described in Supreme Court Rule 7.

(d) Time of Notice. If notice of hearing is given by personal service the notice shall be delivered before 4:00 P.M. of the second court day preceding the hearing of the motion. If notice is given by mail, the notice shall be deposited in a United States Post Office or Post Office Box on the third court day preceding the hearing of the motion.

(e) Summary judgment. A motion for summary judgment will not be heard until 10 days after service of the notice of motion under Supreme Court Rule 7.

Adoption of Rules: 14th Judicial Circuit.

In the first sentence of subd. (b), the words "the name of the judge before whom" are omitted. In subd. (d) the word "court" is omitted from "second court day" and from "third court day".

Ill. Rev. Stat. 1965, Chapter 110, Section 307.1 (Circuit Court Rule 7.1).

Presentation of Drafts.

When the court rules upon a motion other than in the course of trial or makes a final determination in an action, the attorney for the prevailing party shall prepare and present to the court the order, judgment, or decree to be entered, unless the court directs otherwise.

Adoption of Rules: 14th Judicial Circuit.

In the concluding clause, "judge" is substituted for "court".

APPENDIX D

Opinion of the Appellate Court of Illinois

No. 66-101

Betty Dolar Kazubowski, Plaintiff-Appellee,

vs.

Edward J. Kazubowski, Defendant-Appellant.

Per Curiam

The nature of the appeal and the proceedings in this Court can best be understood by a recital of what apparently transpired in the trial court.

The proceeding arose as an action for divorce by Betty Dolar Kazubowski as against appellant, Edward J. Kazubowski. As a result of a jury trial, the issues on the complaint of plaintiff were found in favor of plaintiff and against defendant (and as against defendant on defendant's counterclaim). By reason thereof, a decree for divorce was entered on June 13, 1966. There were no children of the parties and no custody problems are involved.

The decree contained a recital that there was "no reason for delaying enforcement or appeal of this portion of the order" as an attempt to comply with Section 50(2) of the Civil Practice Act [1965 Illinois Revised Statutes, Ch. 110 §50(2)]. The decree made no adjustment of property rights but such matters were reserved by the court for later determination. On July 12, 1966, a post-trial motion was heard with respect to the decree of June 13, 1966, and such motion was denied.

Thereafter, on July 25, 1966, a four-page stipulation was entered into by attorneys for each of the parties presumably settling all property rights. Among other things the stipulation provided for a $15,500 payment by the defendant (the husband) to the plaintiff and such payment was to be secured by a "second mortgage" on property which was owned jointly. To carry this into effect, the interest of the plaintiff was to be conveyed by plaintiff to defendant. The property was owned in joint tenancy during the marriage and there was a first mortgage on it. However, since the divorce action had been instituted, a judgment had been entered as against defendant by confession in the sum of $10,000, in favor of the mother of defendant, Mary Kazubowski. Since a second mortgage would amount under such circumstances, to a third lien, the court decree which was entered later in August, which adopted the stipulation, provided that defendant should secure his payment of $15,500 with a "second lien". The decree further provided that plaintiff (wife) could retain her joint interest in the property until she was given a "second lien" on the property. It is this provision in the stipulation and the action of the court in the decree which appears to be the basis of the problems which arise in this cause. The defendant had filed a motion to amend the stipulation prior to the time the decree was actually entered pursuant to such stipulation.

On July 27, 1966, defendant filed a motion for continuance requesting that no hearing be held on the property division until the divorce decree became final by failure of defendant to file notice of appeal within 30 days after the denial of the post-trial motion which was on July 12, 1966. This motion apparently gave recog-

nition to the recital contained in the decree that there was no reason for delaying enforcement or appeal of the portion of the order decreeing that a divorce was granted.

On August 31, 1966, the court entered the property settlement decree which contained the "second lien" provision hereinabove referred to. The decree was presumably entered pursuant to stipulation of the parties and following appearance of attorneys for the parties in court. At the same time, the court denied defendant's motion to modify the stipulation and the decree, and the property settlement decree was entered. Thereafter, on September 6, 1966, defendant filed objections to the decree on the ground that the court had incorrectly modified the stipulation between the parties. On September 8, 1966, plaintiff filed a petition requesting that defendant be cited for contempt and be ordered to pay attorney's fees. On September 15, 1966, defendant filed amended objections and motion to vacate the decree and an answer to the petition filed by plaintiff.

On September 15, 1966, defendant filed a notice of appeal from the decree of August 31, 1966, covering property settlement in this cause. On this same date, September 15, 1966, a hearing was held with respect to plaintiff's relief requested. The only testimony offered at such time was that of plaintiff's attorney. On cross examination he was asked about the negotiations with respect to the stipulation and he stated unequivocally that he refused to take anything less than a second lien as security against defendant's obligation to pay the $15,500. The court entered an order overruling defendant's objections; allowing citations for contempt; finding defendant in contempt for failure to pay $4,900 on Sep-

tember 1, 1966; allowing $500 attorney's fees for plaintiff's counsel; holding defendant in willful contempt; and directing the clerk to issue a mittimus committing defendant to jail for six months or until he sooner purges himself by payment of $5,400.

On September 19, 1966, plaintiff filed a petition for alimony during the period of appeal and for attorney's fees to pay for the appeal. Defendant filed a special and limited appearance to this motion. On September 23, 1966, a hearing was held in regard to the relief requested on the petition of September 19 referred to and the court awarded $70 a week as alimony and $1,700 as attorney's fees to plaintiff to be paid by defendant. On September 28, 1966, plaintiff filed a petition for a rule to show cause why the September 23, 1966, order was not complied with. Defendant replied to such petition and on September 29, 1966, asked that the September 23 order be included in the appeal. The court allowed this but ordered that the June 13, 1966, decree (the original divorce decree) was not to be part of the appeal. Thereafter, in October and November there were a series of petitions and orders dealing with enforcement of the decree by contempt and also allowing defendant to include these various later orders in the appeal.

On appeal in this Court, defendant contends that it was reversible error to exclude matters prior to July 12, 1966, from the record on appeal. This is based on the contention asserted that the decree for a divorce only is not enforceable nor final and appealable. The June 13, 1966, divorce decree, if appealable, would become final 30 days after July 12, 1966, the date upon which the post-trial motion was denied. There was no appeal

from such decree during such period. Chapter 110 §50(2) (1965 Illinois Revised Statutes) of the Civil Practice Act provides:

> "If multiple parties or multiple claims for relief are involved in an action, the court may enter a final order, judgment or decree as to one or more but fewer than all of the parties or claims only upon an express finding that there is no just reason for delaying enforcement or appeal. In the absence of that finding, any order, judgment or decree which adjudicates fewer than all the claims or rights and liabilities of fewer than all of the parties does not terminate the action, is not enforceable or appealable, and is subject to revision at any time before entry of the order, judgment or decree adjudicating all the claims, rights and liabilities of all the parties."

The question before us is whether this section operates to make the June 13 decree a decree which was not final or appealable.

It is the contention of the defendant that the June 13, 1966 decree could not be construed as a final and appealable order even if there was the finding referred to in Section 50(2) on the basis of *Biagi v. O'Connor*, 18 Ill. 2d 238 and *Davis* v. *Childers*, 33 Ill. 2d 297. In the *Biagi* case (which involved a partnership accounting) a decree was entered dismissing a counter-complaint and referring the matter to a Master. It involved a decree entered in June, 1954, before Section 50(2) was passed. A later decree was entered in July, 1956. The Appellate Court, in construing the section, stated that it was procedural and applied it retroactively. The basic question in the *Biagi* case was that of constitutionality of such retroactive application and is not a precedent for construction of the issue before us.

In *Davis* v. *Childers*, supra, there was a trial before a jury in an automobile accident case. The jury found for the defendant but the trial judge entered a judgment notwithstanding the verdict for plaintiff, and in that judgment provided there was no reason for delaying the appeal. The question of damages was reserved for determination. The appeal was dismissed in the Appellate Court and this action was affirmed in the Supreme Court on the ground that Section 50(2) could not apply even if the judge provided that there could be an immediate appeal. The court there found that there was only a single claim and a single party involved. This tort action is not a precedent to be applied in a divorce action where there is both a termination of the marriage, and an independent, supplementary claim for property settlement even though the relief as to both is sought in one complaint: They are in fact separate claims.

In *McGee* v. *McGee*, 36 Ill. App. 2d 105, a complaint for divorce on the ground of drunkenness was heard without a jury and a decree was entered awarding plaintiff a divorce. The divorce decree simply ordered that the question of property settlement, alimony and attorney's fees are reserved for future consideration of the court. There was no express finding under Section 50(2) that there was no just reason in delaying the appeal, but, on the contrary, the court expressly found that there were still rights to be adjudicated between the parties and which were expressly reserved for future consideration. The court stated that in absence of an express finding required by Section 50(2), the decree adjudicated fewer than all of the matters in contro-

versy between the parties and was not appealable. The court expressly stated (at Page 107):

> "Thus, multiple claims for relief were involved in plaintiff's action. Under such circumstances section 50(2) of the Civil Practice Act provides that the court may enter a *final* decree as to fewer than all of such claims only upon an express finding that there is no just reason for delaying appeal, and that in the absence of that finding, any decree which adjudicates fewer than all of such claims is not appealable."

The court in *Ariola v. Nigro*, 13 Ill. 2d 200, in interpreting Section 50(2), also pointed out that no specific finding under Section 50(2) was made in that case and consequently a court determination was not appealable. Since on the basis of the record, there was such specific finding in the cause before us in compliance with Section 50(2), the decree for divorce was final and appealable. In view of the fact that there was no appeal from such decree, that decree could not be reviewed on this appeal.

The next issue for consideration was whether the decree of August 31, 1966, was proper. In this connection the first question for review is whether the stipulation by attorneys for both parties signed July 25, 1966, was a proper stipulation and a true agreement of the parties and not invalid because of fraud. The parties admit that it was signed properly by attorneys for both parties at the time. Such stipulation in absence of a showing of fraud is binding upon the parties. A stipulation is an agreement between the parties or their attorneys with respect to business before the court and the courts look with favor upon stipulations designed to simplify, short-

en or settle litigation and save costs to the parties (34 I.L.P. 166). It is obvious that one of the parties to a stipulation cannot withdraw from the binding force of such stipulation unless he has the consent of the other party or leave of the court (*Vidou* v. *Roberts*, 330 Ill. App. 104).

Stipulations between parties are enforced by the courts unless there is a showing that the stipulation is a result of fraud, or is unreasonable or contrary to public morals (*People* v. *Spring Lake District*, 253 Ill. 479). In the case before us there was no contention by defendant of any fraud. In fact, the only apparent objection that defendant had to the stipulation appears to be in the variation from the language in the stipulation which referred to a "second mortgage" to a wording of "second lien" in the decree, as an interpretation of what the court felt the parties really intended. It is obvious that stipulations must be construed by the courts when they are enforced as part of a proceeding before the court. In construing a stipulation, the court will look to the actual intention of the parties (*General Electric Co.* v. *Industrial Commission*, 411 Ill. 401; *Lake Shore & Michigan Southern Railway Company* v. *Hessions*, 150 Ill. 546). The interpretation of the trial court that what the parties intended was a mortgage or lien second only to an existing first mortgage was reasonable in light of the facts and record before us. Nothing is shown on appeal in this Court to indicate that this interpretation was erroneous or unsound, nor was any question of fraud raised with respect to this stipulation. We, therefore, conclude that defendant cannot now claim that he is not bound by the stipulation and the interpretation thereof by the trial court. Since the stipulation entered into by attorneys was

valid and the decree was proper under the record, we find no basis for setting aside or modifying such decree.

It is also contended in this Court that the refusal of the trial judge to permit the entire record to be included in the appeal was reversible error. Defendant filed a praecipe for the entire record to which plaintiff objected with respect to the inclusion of any proceedings prior to August 31, 1966. A docket entry was made sustaining objections to the praecipe (although plaintiff contends that since the clerk had not entered the order on the objections, defendant could still have brought up the entire record on appeal). Since we have determined that the June 13, 1966, decree was not appealed from, there was no occasion to have a review of the record prior to August 31, 1966. It is, therefore, unnecessary to determine whether or not defendant was inhibited or prevented from bringing that portion of the record to this Court on appeal. Such exclusion could not have been error under the record before us.

The next fundamental question before us is whether the September 15, 1966, order of contempt could be enforced as against defendant, within the 30 day period after it was entered. Defendant contends that decrees do not become final and enforceable for a period of 30 days after they are entered. Defendant could have prevented the enforcement of such decree by a proper appeal under Section 82 of the Civil Practice Act (1965 Illinois Revised Statutes, Ch. 110 §82) and the filing of bond. The appeal would then operate as a supersedeas. This was not done before the enforcement proceeding on September 15, 1966. Accordingly, the contempt order was valid. Decrees are valid when entered (*Horn* v. *Horn*,

234 Ill. 268). Defendant had an opportunity to suspend the enforcement of the August 31, 1966 decree by institution of an immediate appeal. Under the facts as appear before us, however, the September 15, 1966 contempt order was valid.

Defendant filed his notice of appeal in this case on September 15, 1966. He then attempted on several occasions to amend the notice of appeal to include a number of later orders including the order of September 23 relating to temporary alimony and attorney's fees. While, under the record, it is uncertain whether the appeal has been perfected as to this order (1965 Illinois Revised Statutes, Ch. 110 §101.33), we believe that the record before us is such that there is no showing made in this Court that the trial court abused its discretion in entering the order of September 23, 1966. Under the standards reviewed in *Micelli* v. *Micelli*, 45 Ill. App. 2d 159, 195 N.E. 2d 233, we feel that no showing is made on appeal that such order was not within the sound discretion of the court.

The appeal of appellant, Edward J. Kazubowski, with respect to the decree for divorce is accordingly dismissed and the decree of August 31, 1966, as well as the orders of September 15, 1966, and September 23, 1966, are affirmed.

Certain appeals dismissed and certain decree and orders affirmed.

APPENDIX E

Opinion of the Supreme Court of Illinois

Nos. 42321, 42415 and 42416 cons.—Agenda 41—January, 1970.

Betty Dolar Kazubowski, Appellee, v. *Edward J. Kazubowski*, Appellant.

Petition For Rehearing Denied June 25, 1970

Mr. Justice Burt delivered the opinion of the court:

On the ground that questions arising under the constitution of the United States and of this State are involved, defendant, Edward J. Kazubowski, appeals directly to this court from certain orders of the circuit court of Henry County entered in a divorce case following an unsuccessful appeal by defendant to the Appellate Court for the Third District. Three separate appeals have been consolidated for hearing. Since the questions presented involve alleged constitutional violations arising from proceedings taken before as well as after the earlier appeal defendant has presented here the entire record in the case. It will be necessary to review it for purposes of this opinion.

After a jury trial resulting in a verdict in favor of the plaintiff, Betty Dolar Kazubowski, the circuit court entered a decree on June 13, 1966, dissolving the bonds of matrimony existing between plaintiff and defendant, continuing in force an order for temporary alimony and reserving for future determination the matter of partition, permanent alimony, allowance of attorney fees and such other matters as might lawfully be considered. The decree found that there was no reason for delaying enforcement or appeal of that

portion of the decree granting a divorce. On August 31, 1966, a property settlement decree based on a stipulation filed August 15, 1966, was entered after denying defendant's motion to modify the stipulation. On September 6, 1966, defendant filed objections to the decree. On September 8, 1966, plaintiff filed a petition asking that defendant be cited for contempt and be ordered to pay attorney fees. On September 15, 1966, defendant filed an answer to plaintiff's petition, amended objections and motion to vacate the decree of August 31st and notice of appeal from that decree. A hearing was had on the petition, answer and defendant's objections on September 15th. By an order entered on the same date defendant's amended objections were overruled, defendant was found to be in wilful contempt for failure to pay $4900 on September 1, 1966, as agreed and $500 attorney fees and ordered committed to the county jail for a period of six months unless and until the required $5400 was paid. The order provided that the clerk issue a *mittimus* directing the sheriff to take defendant into custody and imprison him as ordered until the provisions of the order were satisfied. On September 19, 1966, plaintiff filed a petition for an allowance of alimony and attorney fees during the period of appeal. A hearing was held on September 23 after defendant had filed a special and limited appearance. The court ordered that defendant pay $70 per week alimony and $1700 attorney fees. On September 28, 1966, plaintiff filed a petition for rule to show cause why the provisions of the order of September 23 had not been complied with. Defendant replied and asked that the September 23 order be included in the appeal. This was allowed but the court held that the divorce decree of June 13, 1966, was not part of the appeal because no appeal had been taken within the statutory time allowed.

On appeal by the defendant the appellate court held: (1) that, since there had been a specific finding that no reason existed for delay in enforcement or appeal of the divorce decree of June 13th pursuant to the applicable provisions of the Civil Practice Act, the decree was final and appealable and in view of the fact that no appeal had been taken within the time allowed it could not be reviewed, (2) that the property settlement decree of August 31st and the stipulation upon which it was based were valid and binding upon the parties, (3) that the contempt order of September 15th was valid and enforceable and (4) that the order of September 23rd was within the sound discretion of the trial court and valid. Accordingly, the appellate court dismissed the appeal with respect to the divorce decree and affirmed the decree of August 31, 1966, and the orders of September 15, 1966, and September 23, 1966. (*Kazubowski* v. *Kazubowski*, 93 Ill. App. 2d 126, 136.) Defendant, without petitioning for rehearing in the appellate court, filed a petition for appeal to this court as a matter of right. On September 23, 1968, the petition was denied. (39 Ill. 2d 625.) Review by the U.S. Supreme Court was sought by filing a petition for writ of *certiorari*. That court denied the petition on March 3, 1969. (393 U.S. 1117, L. Ed. 2d 89 S. Ct. 993.) The mandate of the appellate court was filed in the trial court on March 12, 1969.

On March 7, 1969, before the mandate was filed defendant filed a motion asking that the circuit court amend its decree of August 31, 1966, by crediting the sum of $70 per week equitable alimony which had accrued pending appeal to the gross sum of $20,500 provided for in the decree. On March 19, 1969, the court entered its order sustaining plaintiff's motion to strike defendant's motion of March 7th. Nevertheless, on the same date (March 19th), defendant

filed a motion that the court enter its order for amounts found to be due under the decree and orders in the cause to date and a determination of issues allegedly not decided by the appellate court. In this argumentative document defendant took the position that since the divorce decree had been final, as decided by the appellate court, plaintiff was not the wife of defendant on September 23, 1966 and therefore the court had no authority to order payments of alimony pending appeal on that date; that plaintiff was "estopped" from receiving such payments; that plaintiff was also "estopped" by the provisions of the decree of August 31st which provided that plaintiff was barred from additional rights to alimony and that each party should pay his own attorney fees; that the stipulation for property settlement was unauthorized and the resulting decree of August 31, 1966 was invalid because it was obtained without notice to defendant and without an opportunity to be heard.

Plaintiff's supplemental petition for attorney fees under the decree of September 23, 1966, was filed on March 19, 1969, the same date on which the above motion was presented on behalf of defendant. The petition alleged that defendant had not paid any part of the alimony and attorney fees as ordered on September 23, 1966; and sought an allowance of attorney fees of $8,463.25 in addition to the $1700 ordered paid in 1966 as well as $270.99 for expenses of appeals and $175 interest on the former allowance. The court set the petition for hearing on March 25, 1969. Defendant responded by filing a special and limited appearance questioning the jurisdiction of the court and a motion for continuance until such time as the court had determined the issues raised by defendant's motion of March 19th. Defendant served notice that he would call up his motion for continuance on March 25th.

Meanwhile, on March 24th the clerk of the court issued a contempt *mittimus* pursuant to the order of September 15, 1966, requiring that defendant pay $4900 alimony and $500 attorney fees which had been affirmed on appeal. Defendant was arrested and confined in the county jail at about noon on that date. He was released at about 4:00 P.M. the next day after payment of $14,000. An order of payment and discharge entered by the court on March 25th at the time of defendant's release finds that the amount paid is in full of all sums due to date under the property settlement decree of August 31, 1966, and the order of September 15, 1966, and that defendant is purged of the contempt citation of September 15, 1966. On April 3, 1969, the court denied defendant's motion of March 19th. The order recites a hearing after notice to the respective parties and that the motion had been taken under advisement.

On April 15th defendant filed a motion for refund of the $14,000 paid on March 25th, alleging that the sum had been obtained as the result of illegal and unwarranted incarceration; that the *mittimus* was illegal and based upon a "void order"; that the proceedings taken constituted imprisonment for debt and deprived defendant of life, liberty and property in violation of his rights under the State and Federal constitutions. The motion further alleged that defendant was not permitted to have a hearing or to testify or produce evidence on March 25th. The record shows that notice of the filing of this motion was given but there is nothing which shows that defendant ever sought a hearing on it after it was filed. On April 18, 1969, a notice of appeal from the contempt *mittimus* of March 24th and the order of payment and discharge of March 25th was filed. This appeal was designated as case number 42321.

On April 22, 1969 plaintiff filed a petition for citation requiring defendant to appear and show cause why he should not be adjudged in contempt for failure to pay the equitable alimony of $70 per week required by the order of September 23, 1966, which was allegedly in arrears for 126 weeks and totalled $8,820. On the same date a notice was served that hearing on this petition had been set for April 28th and that on the same date the court would decide the matter of allowance of attorney fees under plaintiff's petition of March 19, 1969, which had been heard and taken under advisement on April 15, 1969. On April 24th defendant entered a special and limited appearance to the petition of April 22nd alleging that the order of September 23, 1966 was void because of the court's lack of jurisdiction of the subject matter and the person of the defendant; that plaintiff was not the wife of defendant when the order was entered and that the order was contrary to public policy and morals and a denial of due process of law. On April 28, 1969, the court entered an order allowing supplemental attorney fees in the amount of $9227 which were to be in addition to the $1750 allowed on September 23, 1966. Also allowed was $270.99 for printing expenses and costs in connection with the appeals. Payment was ordered to be made within ten days. At the same time an order for citation and rule to show cause for failure to pay $8,820 equitable alimony due under the order of September 23, 1966, was entered returnable on May 2, 1969. The proceedings of April 28th show that defendant's attorney was present and given the opportunity to present evidence and cross-examine witnesses but chose to rely upon her objection to the jurisdiction of the court which was overruled. On the same day the court entered an order on its own motion regulating future pleadings of defendant to those pertaining to the present

pending appeal or to any appeal thereafter instituted, finding from the files that pleadings filed and not yet heard "are voluminous, improper and vexatious". Notice of appeal from the orders entered on April 28th was filed on May 23, 1969. This is designated as case number 42415.

On May 2, 1969 the court entered its order finding defendant justly indebted for equitable alimony under the order of September 23, 1966, in the amount of $8,820; that he had refused and neglected to pay the amount due and that his failure was wilful and contumacious. He was ordered committed for six months or until payment be made or he be otherwise released by due process of law. A *mittimus* was ordered issued by the clerk. As in the earlier proceedings the order recites that defendant has filed only his limited and special appearance and declined to offer any testimony concerning his circumstances or ability to comply with the order of September 23, 1966, or any just or legal reason why he should not be found guilty of contempt. Notice of appeal from this order of May 2nd was filed on May 26, 1969, and originates case number 42416.

With respect to proceedings taken prior to the filing of the mandate of the appellate court it is defendant's position that proceedings in the trial court were improper and illegal because he was denied an opportunity to be heard and that the various orders entered were beyond the jurisdiction and in excess of the powers of the court and constitute a deprivation of life, liberty and property without due process of law. As to the appellate court's decision defendant says (p. 35, defendant's brief): "The opinion rendered by the Appellate Court, Third District * * * cannot be sustained by substantial evidence or the law in light of the record before them on appeal and review. The Appellate Court opinion omits certain facts and confuses others by the con-

text in which it states them, and arrived at an erroneous decision, contrary to the laws of this State, and in direct violation of the constitutional rights against deprivations of property and liberty without due process and equal protection of the laws as guaranteed defendant under the State and Federal Constitutions, totally nullifying the rights of defendant as an appealing party to a full and fair review of the proceedings in the trial court. The Appellate Court failed and refused to make an order that ought to have been made, and failed and refused to grant relief to defendant, who took an appeal to obtain the due process of law which up to that point of time had been denied him in the trial court." It therefore appears that the essence of defendant's argument is that the effect of the orders of the trial court and decision of the appellate court is to deprive defendant of his constitutional rights.

"The law is well settled that where a judgment or decree is challenged on the ground that its enforcement will deprive the person against whom enforcement is sought of some constitutional right, such as due process of law, no constitutional question is involved and the question presented is simply the validity of the judgment or decree. (*Maupin* v. *Maupin*, 403 Ill. 316, 318; *Drury* v. *Hurley*, 402 Ill. 243, 246; *De La Cour* v. *De La Cour*, 363 Ill. 545, 548; *Cooper* v. *Palais Royal Theatre Co.*, 320 Ill. 44, 49; *Paul* v. *Paul*, 278 Ill. 196, 198.) In other words, due process is not a guaranty against erroneous or unjust decisions by the courts which have jurisdiction of the parties and the subject matter. (*Calabrese* v. *Hatlen Heights Sewer & Water Co.*, 34 Ill. 2d 483, 486; *City of Chicago* v. *Shayne*, 27 Ill. 2d 414, 419.) A constitutional question is not raised by the fact that the appellate court may have misconstrued the law or committed an error for which its judgment should be reversed.

(*Kaye* v. *Kremer*, 20 Ill. 2d 148, 152.) The appellate court in this case has decided that all orders and decrees of the circuit court entered prior to the appeal are valid and enforceable. This court denied leave to appeal and the U.S. Supreme Court denied *certiorari*. Any possible questions of validity as well as those of jurisdiction of the subject matter or person are thus settled and the result is binding upon the parties. With respect to defendant's assertions that he was deprived of his right to appear and be heard in the various proceedings in the trial court prior to the former appeal it is sufficient to say that apparently no such questions were raised or passed upon in the appellate court. The rule is that no question which was raised or could have been raised in a prior appeal on the merits can be urged on subsequent appeal and those not raised are considered waived. (*People ex rel. White* v. *Busenhart*, 29 Ill. 2d 156, 159; *Union Mutual Life Ins. Co.* v. *Kirchoff*, 149 Ill. 536, 542.) The rule obtains when a question sought to be raised the second time around is of a constitutional nature. (*People ex rel. Maeras* v. *Chicago, Burlington and Quincy R.R. Co.*, 36 Ill. 2d 585, 588.) In such a case it is presumed that appellant has no objections to urge against the record except those which have been presented and he will not be permitted to assign such errors on a second appeal. (*Jackson* v. *Glos*, 249 Ill. 388, 392-3.) A second appeal brings up nothing except proceedings subsequent to the remandment for the reason that a party will not be permitted to have his cause heard part at one time and the residue at another. (*Ogden* v. *Larrabee*, 70 Ill. 510, 513.) The conclusion is that any errors sought to be assigned by defendant in connection with any proceedings prior to the filing of the mandate after appeal will not be considered by this court. We therefore consider those alleged errors raised with reference to proceedings taken in the trial court thereafter.

The first appeal concerns the issuance of the contempt *mittimus* on March 24, 1969, the imprisonment of the defendant thereunder and the order for payment and discharge entered by the court on March 25th. It is plaintiff's position that in cases such as this involving multiple claims for relief an order which does not dispose of an entire proceeding is not final and appealable without an express finding by the trial court that there is no just reason for delaying enforcement or appeal. (See: Supreme Court Rule 304 (a) 43 Ill. 2d Rule 304.) It is urged that absent such an express finding in this case the appeal should be dismissed. There is authority, however, for the proposition that where an order is in effect specifically enforceable by use of the contempt process it is final and appealable whether or not there has been a finding pursuant to the rule. (*Hirsh* v. *Hirsh* (1967), 81 Ill. App. 2d 354, 358; *In re Estate of Sherwood* (1965), 56 Ill. App. 2d 334, 340; *Micelli* v. *Micelli* (1963), 45 Ill. App. 2d 159, 165.) This court has also recognized that ordinarily an adjudication in a contempt proceeding is final and appealable because it is an original special proceeding, collateral to, and independent of, the case in which the contempt arises where the imposition of the sanction does not directly affect the outcome of the principal action. (See: *People ex rel. General Motors Corp.* v. *Bua*, 37 Ill. 2d 180, 189.) We hold, therefore, that failure of the court to make the finding in question does not preclude our consideration of the question sought to be raised.

The contempt *mittimus* was issued pursuant to the command of the order entered by the trial court on September 15, 1966, which was specifically affirmed and held valid on appeal. Upon filing of the mandate after appeal the clerk was performing a ministerial function in issuing the *mittimus*. The action was mandatory and did not involve the

exercise of any discretion. The imprisonment of the defendant which followed did not constitute imprisonment for debt as prohibited by section 12 of article II of the Illinois constitution. (Ill. Const. art. II, sec. 12; *Mesirow* v. *Mesirow*, 346 Ill. 219, 222; *Barclay* v. *Barclay*, 184 Ill. 375, 376.) In an effort to show that defendant was denied an opportunity to be heard on March 25th, after his imprisonment and that the demands he met were arbitrary and unreasonable, there is attached to defendant's brief as Appendix H the copy of an affidavit of defendant's counsel which purports to state what transpired on the date in question. This affidavit has never been filed in the trial court and is not part of the record on appeal. It cannot be considered by this court. (*Joyce* v. *Harding*, 208 Ill. 77; *Plotke* v. *Chicago Title and Trust Co.*, 175 Ill. 234, 236; *Pardridge* v. *Morgenthau*, 157 Ill. 395, 399.) As already indicated, the motion for refund filed by defendant on April 15th which alleged many violations of defendant's rights on March 25th was never set down for hearing, and no ruling of the court was ever obtained thereon. Defendant does not dispute that the amounts paid were due under the terms of the prior orders of the court assuming that the orders were valid as decided on appeal. There is therefore no basis in the record for a conclusion that defendant was denied the right to be heard as alleged or that any of his constitutional rights were violated by the proceedings taken on March 24th and March 25th, 1969.

The second appeal involves the orders entered on April 28, 1969. As to the order allowing supplemental attorney fees for services rendered by plaintiff's attorneys during the appeals, it should be observed that defendant's only defense to the motion was an objection to the jurisdiction of the court after a special and limited appearance. The con-

tention made repeatedly by defendant that plaintiff was not the wife of defendant and therefore not entitled to the allowance was reasserted. The fact is that defendant's position in this respect is answered by the affirmance of the appellate court of the order of September 23, 1966, which was the original order allowing plaintiff alimony and attorney fees during the appeal. The disposition of this question of lack of marital status is inherent in the appellate court's decision. It could not legally be raised after remandment of the cause for reasons already stated. The assertion in defendant's brief that the order was entered "without any evidence, without any testimony, without any hearing and despite the absence of the defendant" is misleading to say the least. The order recites that defendant appears by his attorney; that evidence is presented on behalf of plaintiff; that defendant is requested to cross-examine the witnesses and present such evidence as he sees fit but that defendant refuses and elects to stand on his objection to the jurisdiction of the court. The record of proceedings in the trial court properly authenticated imports verity and is the sole conclusive and unimpeachable evidence of proceedings in the lower court. (*Spears* v. *Spears* (1963), 45 Ill. App. 2d 167, 171; *County Board of School Trustees* v. *Bendt* (1961), 30 Ill. App. 2d 329, 333; *McGurn* v. *Brotman* (1960), 25 Ill. App. 2d 294, 299.) The order for supplemental attorney fees is supported by the law and the evidence, was not obtained in violation of defendant's constitutional rights and should be affirmed.

The order to show cause for failure to pay equitable alimony as ordered on September 23, 1966, was not a final and appealable order. (*Spears* v. *Spears* (1963), 45 Ill. App. 2d 167, 170; *Atwater* v. *Atwater* (1962), 35 Ill. App. 2d 382.) However it is a valid order since it is based directly

upon the order of September 23, 1966, affirmed in the prior appeal. As to the order regulating pleadings entered on the court's own motion it does not appear that an opportunity for a hearing on any pleading was denied or that it had the effect of precluding defendant from filing any pleading he wished to file. It is purely administrative in character and if it is to operate as a denial of due process as defendant claims that has not as yet been demonstrated. Without a finding as provided in Supreme Court Rule 304, the order is not final and appealable. As the record now stands we believe that the appeal as to this order should be dismissed.

Much of what has been said relative to the order of April 28th, allowing supplemental attorney fees, applies as well to the order of May 2, 1969, finding defendant in contempt for his wilful and contumacious refusal to pay alimony as ordered by the court on September 23, 1966. Again there is a special and limited appearance and an objection to the jurisdiction of the court without any defense on the merits. Claims of violation of the guaranty of due process are repelled by the record which shows that defendant failed to appear and failed to avail himself of the opportunity to testify concerning his circumstances and his ability to pay. The order is clearly supported by the evidence and its legality is established by the affirmance of the order of September 23, 1966. Due process is defined as an orderly proceeding wherein a person is served with notice, actual or constructive, and has an opportunity to be heard and to enforce and protect his rights before a court having power to hear and determine the case. (*Seno* v. *Francke*, 20 Ill. 2d 70, 74; *Orton Crane & Shovel Co.* v. *Federal Reserve Bank of Chicago*, 409 Ill. 285, 289.) Under this concept defendant's claims of violation of the right of due process are groundless.

Appeals from the order to show cause and the order regulating the pleadings entered on April 28, 1969, are dismissed. All other orders from which appeals have been taken in these consolidated cases are affirmed.

Dismissed in part and affirmed in part.

WARD and CULBERTSON, JJ., took no part in the consideration or decision of this case.

APPENDIX F

STATE OF ILLINOIS

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT

HENRY COUNTY

BETTY DOLAR KAZUBOWSKI

vs.

EDWARD J. KAZUBOWSKI
Defendant

SEARCH WARRANT

TO ALL PEACE OFFICERS OF THE STATE OF ILLINOIS or _____:

ON THIS DAY Harold T. Johnson COMPLAINANT, HAS SUBSCRIBED and sworn to a complaint for search warrant before me. Upon examination of the complaint I find that it states facts sufficient to show probable cause and I therefore command that ~~the person or~~ the premises of 133 E. Division Street, Kewanee, Illinois ~~and~~ (premises) be searched and the following ~~things connected in the commission of a crime, the person~~ Person, EDWARD J. KAZUBOWSKI be seized therefrom:

I further command that a return of ~~anything~~ anyone so seized shall be made without unnecessary delay before me or before Judge DAN H. MC NEAL or before any court of competant jurisdiction.

Dan H. McNeal
Judge

Date of Issuance June 26 19 70

Time of Issuance _____

Sheriff's Fees
Service - $4.00
Mileage - 6.40
Return - 3.60

RETURNED NOT EXECUTED

I did not execute this warrant within 96 hours from the time of issuance and it is hereby returned to the court as void and not executed.

_____
Officer

Date Returned _____ 19 ___

Time Returned _____

Filed July 1-1970
Dean Leander, Clerk of Circuit Court
By Elsie Leander, Deputy

APPENDIX G

IN THE CIRCUIT COURT OF HENRY COUNTY
14TH JUDICIAL DISTRICT
GENERAL DIVISION

BETTY DOLAR KAZUBOWSKI,
Plaintiff
vs.
EDWARD J. KAZUBOWSKI,
Defendant

NO. 65 D 1240

MITTIMUS

WHEREAS, on the 2nd day of May, 1969, a certain Order made in the Circuit Court of Henry County, Illinois by Hon. Paul E. Rink, Judge of said court in a certain cause number 65 D 1240 pending in said court herein where Betty Dolar Kazubowski was plaintiff and Edward J. Kazubowski was defendant, it was ordered that Edward J. Kazubowski be committed to the common jail of Henry County, Illinois, there to remain charged with the direct contempt mentioned in such order for six (6) months or until released by due process of law, and that a warrant for that purpose issue.

NOW, we command you that you take the body of said Edward J. Kazubowski and closely and safely keep him in your custody in the common jail of Henry County until he shall have served six months or until released by due process of law; and you are to return this Writ forthwith to this court with an endorsement thereon showing in what manner you shall have executed the same.

WITNESS, Dean Leander, Clerk of said court, and the seal thereof at Cambridge, Illinois this 7th day of May, 1969.

Dean Leander

Sheriff's Fees
Service - $4.00
Mileage - 6.40
Return - 3.00
$13.40

State of Illinois)
) SS
County of Henry)

One June 26, 1970, I took custody of Edward J. Kazubowski and I am keeping him in the common jail of this County.

Harold T. [illegible] Sheriff

APPENDIX H

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IN THE CIRCUIT COURT OF HENRY COUNTY
14TH JUDICIAL DISTRICT
GENERAL DIVISION

BETTY DOLAR KAZUBOWSKI,
Plaintiff
vs.
EDWARD J. KAZUBOWSKI,
Defendant

NO. 65 D 1240

ORDER OF COMMITMENT

This cause coming on to be heard further upon the rule to show cause heretofore entered on April 28, 1969 and it appearing that the defendant, Edward J. Kazubowski, has filed only his special and limited appearance by his counsel in this cause and that on this day of May 2, 1969, when said defendant was ordered to appear herein and either answer by a pleading or testify herein concerning his circumstances and ability to comply with the Order of September 23, 1966, the said defendant, Edward J. Kazubowski fails to appear herein and the court having heard the arguments of counsel for the parties and being fully advised in the premises finds:

1. That it has jurisdiction of the subject matter hereof and the parties hereto.

2. That defendant, Edward J. Kazubowski, is justly indebted for equitable alimony in the amount of $8,820 as required of him by the Decree of September 23, 1966 in this cause.

3. That said defendant, Edward J. Kazubowski, has failed and neglected to show any valid and just reason for his wilful and contumacious refusal to comply with said decree.

4. That said respondent, Edward J. Kazubowski, has wholly failed and neglected to show any just or legal reason why he should not be found guilty of contempt of this court and punished accordingly, and

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the respondent, Edward J. Kazubowski, is guilty of contempt of this court for his wilful and contumacious refusal to pay the sum of $8,820 as heretofore ordered by this court.

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IT IS FURTHER ORDERED that the respondent, Edward J. Kazubowski, be and he is hereby committed to the common jail of Henry County there to remain charged with contempt of the Circuit Court of Henry County for the period of six (6) months unless he shall purge himself of said contempt by delivering over to the plaintiff, Betty Dolar Kazubowski, the sum of $8,820 together with interest thereon at the rate of five per cent (5%) per annum from March 12, 1969, the date upon which the mandate from the appeal courts was returned and filed with this court, or until he is released by due process of law.

IT IS FURTHER ORDERED that a mittimus issue out of and under the seal of this court directed to the Sheriff of Henry County commanding him that he take the body of the respondent, Edward J. Kazubowski and him safely keep in the common jail of Henry County there to remain charged with contempt of the Circuit Court of Henry County for a period of six (6) months unless he shall purge himself of said contempt by delivering over to the plaintiff, Betty Dolar Kazubowski, the sum of $8,820 together with interest at the rate of five per cent (5%) per annum from and after March 12, 1969 or until he shall be released by due process of law.

Dated this 2nd day of May, 1969.

Paul E. Burk
Judge

APPENDIX I

STATE OF ILLINOIS

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT

HENRY COUNTY

COMPLAINT FOR SEARCH WARRANT

HAROLD T. JOHNSON complainant now appears before the undersigned judge of the Circuit Court of said County and requests the issuance of a search warrant to search ~~the~~ the premises of 123 E. ~~xxxxx~~ Division Street, Kewanee, Illinois (premises) and seize the following ~~instruments, articles, and things which have been used in the commission of, or~~ ~~which constitute evidence of the offense of~~ person, EDWARD J. KAZUBOWSKI

Complainant says that he has probable cause to believe, based upon the following facts, that the above person is listed ~~things~~ to be seized ~~are~~ now located upon the ~~premises~~ premises set forth above:

1. A Reliable Informant, Betty Dolar Kazubowski,

Harold T. Johnson
Complainant

Subscribed and sworn to before me on

June 26 19 70

David H. Manuel
Judge

Filed July 1-1970
Ben Lustig, Clerk of Circuit Court
By Doris Venable, Deputy